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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 658

STATE OF SOUTH DAKOTA,
Petitioner,

VS

THE NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, and FIRST BANK STOCK CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit hereinafter recited.

REFERENCE TO OPINIONS BELOW

The opinion of the United States District Court in the present case was issued on July 17, 1963, and is reported at 219 F. Supp. 842. The opinion of the United

States Court of Appeals for the Eighth Circuit issued on August 10, 1964, and is reported at 335 F.2d 444.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1254(1). Petitioner believes that Rule 19, section 1(b) of the Revised Rules of the Supreme Court confers upon this Court jurisdiction to review the decision of the Court of Appeals because the Court of Appeals has in this case decided an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED

The following questions are presented for this Court's determination:

1. Does the State have standing to enforce a violation of the Bank Holding Company Act?
2. Does the Bank Holding Company Act make the bank's acquisition of the three state banks illegal?

STATUTE INVOLVED

The statutes involved are 12 U.S.C., 1842 (a) (c) and (d), 12 U.S.C., §1846, 12 U.S.C., §1847, and §11 of the Act of May 9, 1956, 70 Stat. 133 (Savings Clause).

STATEMENT OF CASE

The petitioner, State of South Dakota, seeks a Writ of Certiorari from this Court to review the judgment of the Court of Appeals, Eighth Circuit (R. 148), affirming the

judgment of dismissal on the merits and summary judgment in favor of the defendants (R. 133).

This action is for a declaratory judgment and injunction, brought by the State of South Dakota against the defendants. The action arises out of an "agreement of merger and plan of reorganization" dated October 9, 1962, and entered into by and between the First Bank Stock Corporation of Minneapolis, Minnesota, its subsidiary, The National Bank of South Dakota, Sioux Falls, and the three state banks then known as the Farmers and Merchants Bank of Wessinton Springs, Platte and Presho, South Dakota. Under the agreement, the three state banks were to be merged into and absorbed by the defendant National Bank of South Dakota, Sioux Falls. The stock of the state banks was to be surrendered for cancellation (R. 8) in return for stock of the First Bank Stock Corporation according to an agreed ratio of the relative values of the stock (R. 11).

Upon execution of the agreement of merger, each of the three state banks was made a branch of the defendant National Bank; additionally, the former branch office of the Platte Bank located at Corsica, South Dakota, was converted into a branch of the defendant bank (R. 113).

Petitioner contends that as a result of the merger as aforesaid defendant holding company expanded across state lines in violation of the Bank Holding Company Act, 12 U.S.C.. §1842, and that the State of South Dakota in accordance with its duty to protect the citizens thereof from such illegal acts, seeks to have these acts judicially declared unlawful and to have the defendants enjoined from continuing in the perpetration of such acts. Petitioner is supported in this request by the Independent Bankers Association composed of 6300 national and state member

banks in 40 states who feel that a test of the Bank Holding Co. Act (12 U.S.C., 1842(d)) is vitally needed to preserve competition in the field of banking.

The action having arisen out of the laws of the United States, the Federal District Court had jurisdiction under 28 U.S.C., §1331.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT

ARGUMENT I.

1. Does the State Have Standing to Enforce a Violation of the Bank Holding Company Act?

The Court of Appeals for the Eighth Circuit has affirmed the decision of the United States District Court for the District of South Dakota that the State of South Dakota lacks standing to question the legality of a take over of three of its State Chartered banks by a foreign Bank Holding Company through the provision of the Bank Holding Company Act of 1956 (12 U.S.C., §§1841-1848) and that the act, which provides only criminal penalty does not permit court enforcement, is the contention of the State of South Dakota that this holding is contrary to the spirit and intention of this legislation, particularly 12 U.S.C., §1842(d), the intention of which as its author Senator Douglas explained to his colleagues on the Senate floor prior to its passage was,

> to prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so. 102 Cong. Rec. 6857-6864 at 6859 (1956).

In spite of this, a bank holding company has expanded across State lines into the State of South Dakota, and the

State of South Dakota has been held by the lower courts to be without any forum in which to challenge the invasion.

The question of the right of South Dakota to challenge violations of the Bank Holding Company Act is one of first impression and opens a new field in the area of Federal-State relations.

The lower courts held that the State is not a proper party plaintiff because Congress, in enacting the Bank Holding Company Act, did not make specific provisions for civil enforcement. Direct provisions of the Act show that Congress was vitally concerned with rights of the various states in relation to this Act. The state supervisory authority must be consulted when the bank sought to be acquired is a state bank (12 U.S.C., §1842(b)); states may specifically prohibit out-of-state holding companies to operate within their jurisdiction (12 U.S.C. 1842(d)); the Act was not to be construed to prevent any State from exercising any jurisdiction which it had, or may have acquired over banks, bank holding companies, and their subsidiaries (12 U.S.C., §1846). Also pertinent in this context is Section 1848 and the savings clause of the Act, Section 11.

Of what use to the State are these obvious attempts to curb Federal domination of the banking industry if there is no recourse to the courts, by the states to enforce the provisions of the Act?

The lower courts decided that the Act may be enforced solely by the Department of Justice of the United States of America. This contention is based upon 12 U.S.C., §1847, which provides that *willful* violations of the Act are subject to criminal prosecution. This section is similar to the provision of the National Bank Act (12

U.S.C., §93), which has been enforced by civil suits. If the appellate courts' decision is allowed to stand, the Act may be violated if it is done in good faith, which is a harsh and unnecessary construction contrary to the intent of Congress in passing this legislation in an attempt to curb the alarming rate of expansion by bank holding companies.

The legislative history for the Act shows that the members of the Federal Reserve Board who testified at the hearings preferred that their agency not be charged with the enforcement of the act, but would rather have it enforced criminally by the Department of Justice, but nowhere does the Act indicate that this should be the exclusive means of enforcement. In light of the extensive safeguards to the states in the Act it is unreasonable to assume that Congress intended to render these useless by refusing civil enforcement to the state.

If the Act has been violated, a wrong without a remedy has been permitted if the State cannot challenge the violation. The Act gives to the states certain rights, among which is the right to exclude foreign bank holding companies from the state unless specific legislation by the state permits their entrance (12 U.S.C. 1842 (d)). A right, created by statute, which has no effective method of enforcement is, in effect no right at all. The United States Attorney General could not maintain a successful criminal action since it is not even maintained that the violation of the Act was *willful*. The Comptroller of the Currency will obviously not bring an action since he approved the transaction that is the subject of the lawsuit. The banks which were swallowed up by the holding company are in a sparsely populated rural area in which there are no other state banks in the immediate vicinity which would have sufficient standing to maintain a suit. This

means if the state has no standing and the Act was not willful, a violation exists without a remedy. Surely the right to contest this perversion of the Bank Holding Company Act resides somewhere, and no party has a greater right to maintain this action than the State of South Dakota.

Certainly this must present a situation contemplated by this court when it stated in *Hopkins Federal Savings and Loan Assn.* v. *Cleary*, 296 U.S. 315, 339 (1935), when it said:

> "[T]here are many situations where no one other than the state will be held to be aggrieved, with the result that the capacity to sue is either there or nowhere."

Historically, states have had the capacity to sue in either of two capacities; in its corporate capacity or that of parens patriae. Due to the peculiarities of the Federal-State relationship in the area of the dual system of banking neither government can preempt the field of banking. Since this is true there necessarily must arise either a new, unique third right to maintain a suit in this area or an amplification of the doctrine of parens patriae to permit a state to maintain an action to protect its state chartered banking system from being engulfed, against the will of the state and the dictates of a Federal law enacted to protect the dual system of banking.

ARGUMENT II.

Section 1842 of the Bank Holding Company Act Renders the Respondent's Acquisition of the State Banks Unlawful.

The Douglas Amendment, or subsection (d) of 12 U.S.C. 1842, prohibits the expansion across state lines of holding companies unless the state in which the expansion

is to take place specifically authorizes acquisition of state banks by a foreign holding company. The authorization must be made expressly by statute laws of the state; such authorization was not and has not been given by the statute laws of South Dakota.

The courts below, however, in the face of this patent circumvention of the Douglas Amendment, have reasoned that an exception made in subsection (a)(3) of that Act applies so as to exempt this transaction from the prohibition of the Act.

Section 1842(a)(3) reads as follows:

> "(a) It shall be unlawful except with the prior approval of the Board. . . (3) for any bank holding company or subsidiary thereof, *other than a bank*, to acquire all or substantially all of the assets of a bank; . . ." (Emphasis supplied).

The reasoning of the lower courts was premised on the assertion that the apparent exception applied to this transaction and that, therefore, application to the Federal Reserve Board was unnecessary. From this it was deduced that there could be no violation of the Act because 1842(d) applied only to acquisitions that required Board approval. However, petitioner contends that the apparent exception in 1842(a)(3) does not affect the transaction in this case, and even assuming that it does, 1842(d) still prohibits the acquisition.

An examination of the incidents of the "agreement of merger" reveals the true nature of the transaction. The plan was the creature of the holding company, effecuated by it throughout all stages, executed at its instance, and finally consummated by the exchange of its stock as the consideration (R. 11).

It appears clearly then that the entity making the acquisition of the state banks was not the almost totally-owned subsidiary national bank; rather, it was the parent holding company acting under the camouflage of its local identity. If, on the very face of it, the transaction does not reveal with sufficient clarity that First Bank Stock annexed these state banks to its interstate empire, the corporate veil of the National Bank can be pierced in order to expose the octopean holding company in its actual capacity, unadorned, as the true actor in this acquisition.

The Circuit Court for the District of Columbia, in a somewhat similar case, pierced the corporate veil and laid bare an attempt to use the holding company device to create a prohibited branch bank. *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), *cert. granted* 32 U.S.L. Week. 3328.

There can be no doubt or disagreement that the former owners of the state banks wanted and got First Bank Stock Corporation stock; had there been no other party to the exchange of such stock for the assets of the state banks, a violation of 1842(a)(3) would be obvious. The tender of 5,000 shares of the subsidiary bank, ostensibly as consideration to the parent holding company, can be regarded as no more than a colorable maneuver to simulate an acquisition by the subsidiary bank. In reality the device is a sham and it should not be made available to the perpetrators as a technique for avoiding the prohibition of Section 1842(a)(3). If 1842(a)(3) applies, then the Board would not be able to approve the transaction because of the mandate of 1842(d). The latter Section states:

> "(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or

any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. May 9, 1956, c. 240, §3, 70 Stat. 134."

That the situation involved here is precisely that which was intended by Congress to be avoided is illustrated by the proceedings reported in the Congressional Record and appended to this petition as appendix "D". In short, First Bank Stock Corporation has further expanded its concentration of power across state lines into the State of South Dakota without regard for and contrary to the wishes of the State of South Dakota and the express will of Congress made clear in the legislature history. Whether the state must sit by and permit this unlawful intrusion is respectfully submitted to be the question to be decided by this Court.

CONCLUSION.

Petitioners feel that this case presents a more vital question than the interpretation of a statute. On this decision rests the preservation of the dual banking system as both State and Federal Governments have attempted to maintain it. The act of defendants complained of is capable of widespread use and could result in a complete breakdown of equality of competition between the federal and state banking systems which is far beyond the intention of the federal statutes involved.

Petitioners also feel that the conflict between the federal and state regulatory powers as they regard the standing of the state to enforce the provisions of the Bank Holding Company Act—being a vital question of federal state relations of first impression—necessitates a decision by this court.

For these reasons petitioner respectfully asks that a writ of certiorari be granted.

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APPENDIX "A"

§ 1842. Acquisition of bank shares or assets— Prior approval of Board as necessary; exceptions

(a) It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title, (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

(b) * * *

FACTORS GOVERNING DETERMINATION OF APPLICATION FOR APPROVAL

(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisition or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

LIMITATION BY STATE BOUNDARIES

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. May 9, 1956, c. 240, § 3, 70 Stat. 134.

§ 1846. Reservation of rights to States.

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. May 9, 1956, c. 240, § 7, 70 Stat. 138.

Savings Clause. Section 11 of Act May 9, 1956. "Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct."

§ 1847. Penalties

Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisonment.

APPENDIX "B"

STATE OF SOUTH DAKOTA, Appellant,

v.

The NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, and First Bank Stock Corporation, Appellees.

No. 17460.

United States Court of Appeals, Eighth Circuit.

Aug. 10, 1964.

Before VAN OOSTERHOUT, BLACKMUN and MEHAFFY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff State of South Dakota appeals from order sustaining defendants' motion for summary judgment and the resulting final judgment dismissing its complaint. Judge Mickelson's well-considered opinion setting out the facts, the issues, the applicable statutes and the basis for his decision is reported at 219 F. Supp. 842.

Plaintiff's complaint seeks a declaratory judgment and injunction against the defendants National Bank of South Dakota, a national bank located at Sioux Falls, South Dakota (hereinafter called National Bank) and First Bank Stock Corporation, a bank holding company owning over 90% of the stock of National Bank.

All parties moved for summary judgment. There is no dispute as to material facts. This action arises out of an "Agreement of Merger and a Plan of Reorganization" dated October 9, 1962, entered into by and between First

Bank Stock Corporation, its subsidiary National Bank, and three state chartered banks known as Farmers and Merchants Bank, of Wessington Springs, Platte and Presho, South Dakota, controlled by N. J. Thomson, hereinafter jointly called Thomson Banks. Under such agreement, all acceptable assets, being substantially all of the assets, of Thomson Banks were to be transferred to National Bank. Liabilities of the Thomson Banks were to be assumed by National Bank; the stock of Thomson Banks was to be surrendered for cancellation; National Bank was to increase its capital stock by $500,000, issuing 5,000 shares of $100 par value stock to First Bank Stock Corporation, and First Bank Stock Corporation was to pay Thomson Banks stockholders with stock in its own corporation in accordance with an agreed ratio. The agreement provided that the capital surplus and undivided profits of the merged bank would be equal to that of the merging banks. Such agreement was unanimously approved by the stockholders of each affected corporation.

The Comptroller of the Currency pursuant to federal law on December 6, 1962, approved the merger and certified that the merger of the Thomson Banks into National Bank had been accomplished in accordance with federal statutes. On the same date, the Comptroller approved National Bank's application for establishing branches at Platte, Presho and Wessington Springs, South Dakota, and also at Corsica, South Dakota, where the Platte bank had previously maintained a branch. The merging Thomson Banks were the only banks located in such towns.

Plaintiff bases jurisdiction upon 28 U.S.C.A. § 1331(a), asserting a federal question is presented and that the jurisdictional amount is involved. No diversity of citizenship exists and no claim of jurisdiction based upon diversity of citizenship is made.

Count I attacks the merger as being in violation of 12 U.S.C.A. § 36(c) regulating establishment of branches by national banks.

Count II is based upon an alleged violation of the Federal Bank Holding Company Act, 12 U.S.C.A. §§1841-1848.

Independent Bankers Association has by leave of court filed brief amicus curiae in support of plaintiff's position and has participated in oral argument.

Plaintiff's standing to maintain each count of the complaint is challenged. The trial court discussed the jurisdiction issue at pages 846-848 of 219 F. Supp. and determined that plaintiff lacked standing to maintain either count of the complaint. The court then proceeded to consider plaintiff's complaint upon the merits and found against the plaintiff.

With respect to Count I, the question of standing has become moot. See United States v. Alaska Steamship Co., 253 U.S. 113, 115-116, 40 S.Ct. 448, 64 L.Ed. 722.

12 U.S.C.A. § 36(c), so far as here material, authorizes national banks to establish branches in states where statutes specifically grant state banks power to operate branches subject to all restrictions on location imposed upon state banks by state law.

[1] South Dakota law authorizes state banks to establish branches subject to certain limitations not here applicable. Plaintiff's standing to challenge the Comptroller's authorization of the branches here involved, if it exists at all, must arise out of Rule 17 adopted by the State Bank Board in 1945. Such rule, to the extent here material, prohibits establishment of a branch bank more than 50 miles from its home office. It is agreed the branch

banks here involved are located more than 50 miles from the home office of National Bank at Sioux Falls. The trial court held Rule 17 to be invalid upon the basis that it goes beyond applicable South Dakota statutory standards. The South Dakota Supreme Court in Livestock State Bank v. State Banking Commission, 127 N.W.2d 139, decided while this appeal was pending, squarely held that "Rule 17 is invalid as an unwarranted attempt by the State Banking Commission to exercise legislative power." Such determination by the court forecloses any possible attack on the validity of the Comptroller's approval of the branch banks here involved.

The threshold issue presented on Count II, based upon the Bank Holding Company Act, is whether plaintiff has standing to bring this action. Upon this issue, the court states:

> "The enforcement of the Bank Holding Company Act of 1956 is dependent upon criminal prosecution. 12 U.S.C.A. § 1847. There is no provision in the Act for civil enforcement, and although there apparently have been no decisions respecting the enforcement of the Act, the legislative history of the Act leads the Court to believe that Congress clearly intended to limit the enforcement to criminal prosecutions. See 1956 U.S. Code Cong. & Admin. News, Vol. 2, pp. 2482-2513. Where Congress has not provided for civil suits to enforce federal legislation, it is not for the courts to do so. See Riss & Company v. Association of American Railroads, D.C., 178 F. Supp. 438 (1959)." 219 F.Supp. 842, 848.

In Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61, the issue was whether Congress had provided for judicial review of certain National Mediation Board determina-

tions. In holding no such remedy exists, the Court states:

> "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. Tutun v. United States, 270 U.S. 568, 576, 577 [46 S.Ct. 425, 426, 70 L.Ed. 738]. In such a case the specification of one remedy normally excludes another." 320 U.S. 297, 301, 64 S.Ct. 95, 97.

See Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 23 L.Ed. 196; Brouk v. Managed Funds, Inc., 8 Cir., 286 F.2d 901.

The Bank Holding Company Act contains no express provision for civil enforcement. The legislative history of the Act as shown by Judge Mickelson's opinion supports the defendants' view that Congress intended the criminal enforcement provision to be exclusive. The Bank Holding Company Act was originally proposed by President Roosevelt in a message to Congress in 1938. The history of the legislation is sketched in Senate Report No. 1095, July 25, 1955; 2 U.S. Code Cong. & Admin. News (1956), pp. 2482-2513. In an earlier proposed Bank Holding Company Bill, S. 310, 77th Congress, express provision is made for civil enforcement of any liability or duty and for injunctive relief.

At various hearings before Congressional committees, Governors of the Federal Reserve System charged with the administration of the Act advocated criminal penal-

ties as the exclusive means for enforcement. Governor Robertson, appearing before the Committee on behalf of the Board on June 24, 1952, stated:

> "Bearing always in mind the desirability of keeping the legislation to a minimum, it is our feeling that the only essential measure of enforcement, and the most effective one, would be a provision for criminal penalties for violation of the statute or of conditions prescribed by the administering agency in granting consent to acquisitions of bank stocks. This would place complete responsibility for enforcement of the law in the Department of Justice. The administering agency would not be placed in a position in which it would be required to institute proceedings for enforcement." Hearing Before the House Committee on Banking and Currency, 82d Cong. 2d Sess., on H.R. 6504 (June 24, 1952), pp. 26-27.

Similar statements were made at subsequent hearings in subsequent years. Hearings Before the Senate Committee on Banking and Currency, 83d Cong., 1st Sess., on S. 76 and S. 1118, p. 17; Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12 and 14, 1955), p. 61; Hearings Before the Committee on Banking and Currency, United States Senate, on Nomination of William McChesney Martin, Jr., 84th Cong., 2d Sess., pp. 36, 37.

Thus, it appears that the Act and its legislative history disclose no intent on the part of Congress to create rights to be enforced by civil litigation.

The foregoing determination on standing is conclusive and we need not exhaustively treat the attack on jurisdiction based upon the failure of the State to show that either the State or any of its citizens was aggrieved. South

Dakota has not enacted any legislation respecting bank holding companies. The State concedes that there are no state banks in the immediate vicinity of the banks involved in the merger which would have sufficient standing to entitle them to maintain this action. In this respect this case is distinguishable from Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 285, 323 F.2d 290. In that case the court determined that the plaintiff banks had standing to sue, and the court declined to pass upon the standing of the State to sue. We believe the trial court in our present case properly determined:

> "The operation of the Thomson banks as branches by the National Bank does not appear to invade any established property rights of the State or of any state bank. The State has not demonstrated that any individual is being adversely affected by the operation of the branch banks." 219 F.Supp. 842, 847.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 is of no aid to the plaintiff. Jurisdiction in that case is based upon the Sherman and Clayton Acts which differ materially from the Acts we are here considering.

[2] We hold that the trial court correctly dismissed the case for want of jurisdiction.

[3] It is conceded by the parties that there are no cases directly in point upon the State's standing to bring this action. Likely for this reason, the court proceeded to give full consideration to the issues presented by this case upon the merits. We have chosen to review such decision upon the merits. Judge Mickelson's opinion, 219 F.Supp. pp. 852-854, convincingly demonstrates that the activities here attacked constitute an acquisition of assets (not of stock) by a bank (not by a holding company) and

hence we agree that the transaction falls within the exception granted by § 1842(a). Such section, so far as here material, provides:

> "(a) It shall be unlawful except with the prior approval of the Board * * *; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank * * *."

The words in the statute "other than a bank" clearly show the intention of Congress not to require a bank acquiring the assets of another bank to obtain Board approval. The remaining subsections of § 1842, including subsection (d) largely relied upon by the plaintiff, set forth the procedures to be followed where an application to the Board of Governors is required. The words of subsection (d) reading: "no application shall be approved under this section" manifest a Congressional intention that the section only applies to instances where approval of the Board of Governors is required. As Judge Mickelson points out, such interpretation is substantiated by the legislative history and the administrative interpretation of such provisions by the Board of Governors.

[4] Plaintiff makes the contention that the transaction is in substance an acquisition of stock rather than the acquisition of assets and hence does not fall under § 1842 (a) (3). Plaintiff in its pleadings consistently urged that the transaction was an acquisition of assets by National Bank and the court so found. Plaintiff cannot thus shift its position upon appeal and assert an issue not raised in the trial court. In any event the record clearly shows that National Bank acquired the assets of the Thomson Banks, not their stock.

Plaintiff urges that the corporate veil should be pierced and that the transaction should be treated as an acquisition by the holding company rather than by the bank. The trial court properly rejected such contention, stating that no subterfuge was here involved. National Bank is a separate corporation. It has held a national charter for many years and is to continue as the surviving bank. It serves a definite corporate purpose, separate and distinct from the holding company. First Bank Stock Corporation has existed as a separate corporation owning stock of national and other banks for a considerable period of time. In this respect, this case differs materially from Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., supra.

[5] Plaintiff has failed to demonstrate that the court under the factual situation here presented committed error in determining that the corporate veil should not be pierced.

[6] Courts must base their decisions upon existing law. If the public interest calls for further restrictions upon branch banking and bank holding companies expansion, the remedy lies in appropriate legislation.

As heretofore stated, we believe the trial court was correct in determining it lacked jurisdiction to hear and determine this case and that the judgment is entitled to be affirmed on that basis. We further hold that if jurisdiction in fact exists, the court properly determined that the case should be dismissed upon the merits.

The judgment appealed from is affirmed.

APPENDIX "C"

(Judgment)

United States Court of Appeals for the Eighth Circuit.

No. 17,460. September Term, 1963.

State of South Dakota,
Appellant,
vs.
The National Bank of South Dakota, Sioux Falls, and First Bank Stock Corporation.

Appeal from the United States District Court for the District of South Dakota.

This cause came on to be heard on the record from the United States District Court for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 10, 1964.

APPENDIX "D"

(Judgment)

The PRESIDING OFFICER. The amendment offered by the Senator from Illinois for himself and other Senators will be stated.

The LEGISLATIVE CLERKS. On page 8, between lines 6 and 7, it is proposed to insert the following new subsection:

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

Mr. DOUGLAS. Mr. President, the pending bill, and the amendment which has just been read, are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power, and instead to keep the private control of credit diffused as much as possible. For we know that when the credit resources of a country become concentrated and fall into a few hands, then the

industry and trade of that country also become concentrated.

Big banks commonly find it much easier and more to their liking to do business with big business rather than with little business.

JACKSON FOUGHT CENTRALIZATION OF BANKING AND CREDIT

Andrew Jackson realized all this when he faced Nicholas Biddle and the Second Bank of the United States. Biddle, building on the traditions of Hamilton, and supported by the Whigs under Webster and Clay, was attempting to make his bank the dominant financial institution of the whole country. He was fast succeeding in this attempt when Andrew Jackson took him on. Jackson not only opposed the private creation of monetary purchasing power by the bank, but also its tendency toward monopolizing credit by driving out the small banks. He wanted credit and banking to be decentralized and diffused so that men might be free.

In that terrific struggle, lasting over a decade, Jackson, aided by Thomas H. Benton, saved economic democracy in this country for a time by denying a new charter to Biddle's bank. And although the Whigs tried hard to revive Biddle's power, they were turned back by the Democrats and by John Tyler at a later date.

Similarly, when Salmon P. Chase created the national banking system during the Civil War, he not only desired to create a market for Government bonds by building up a supplementary currency built upon them, but he also wanted to have so many national banks created by the lure of double interest that the new banking system would also be diffused like that of the various State systems.

In short, we who are struggling to prevent the concentration of financial power from becoming greater are carrying on the fighting tradition of Andrew Jackson who wanted a competitive and a free America, and not one dominated by a relatively small group of financiers and industrialists.

DANGERS OF CONCENTRATED BANKING POWER SHOWN IN EXPERIENCE OF BRITAIN

If we look abroad we see plenty of corroboration for our fears about the concentration of banking powers. A century and a quarter ago, England had large numbers of provincial bankers who helped to finance the relatively small industries of their localities. But gradually these private bankers were bought up by and merged with the bigger houses, so that for many years now there have been virtually only five banks which have mattered in England and Wales, namely, Barclays, Lloyds, Midland, Westminster, and National Provincial. These firms do more than three-quarters of the banking business of the entire United Kingdom, including Scotland and Northern Ireland.

Along with this concentration in banking, and partially caused by it, there has developed a concentration in manufacturing and in industry. There is but 1 chemical company in Great Britain, 2 flour concerns, 2 chocolate and cocoa companies, only a handful of breweries and distilleries, not more than 2 tobacco companies, and tight cartels in steel, tin, machinery, and textiles. Professor Ben Lewis has shown how widespread this stifling of competition is in Great Britain. The Big Five have been important factors in promoting this concentration and in reducing competition.

BANKING CONCENTRATION IN CANADA AND GERMANY ALSO LEAD TO INDUSTRIAL MONOPOLY AND CARTELS

Canada, our neighbor to the north, is going through a similar experience. There are only 11 banks in all of Canada to serve 16 million people. The Bank of Montreal, for example, has absorbed at least 10 other banks and has 603 branches. The Royal Bank of Canada, a consolidation of another 10 banks, has 793 branches. Ten more banks have been absorbed into the Canadian Bank of Commerce, which now has 651 branches, while still another score of banks have been swallowed up in the Canadian Bank of Commerce. The Bank of Nova Scotia, a consolidation of half a dozen banks, has 415 branches, while 2 banks designed to serve primarily the French-Canadian population have 560 and 349 branches, respectively.

The two biggest banks in Canada, namely, the Bank of Montreal and the Royal Bank of Canada, have almost precisely half of the total bank deposits in the entire country. If we add the third largest bank, 67 percent or two-thirds of the countrywide total will be included. The top four have well over three-quarters of the total deposits.

As in Great Britain, monopoly and quasi-monopoly in industry have accompanied this concentration of banking. There is, I believe, only one tobacco company, for example, in all of Canada, and one private railroad; and a similar situation exists in a very large number of industries. Moreover, industry and banking are so intertwined in directing personnel and in financing as to prove how the concentration of banking power has helped to promote industrial monopoly and quasi-monopoly.

Incidentally, the power of the private monopolies led to the movement for nationalization which was carried

out for about one-fifth of the British industry by the Labor Party from 1945 to 1951.

The example of Germany is notorious. Prior to Hitler there were only three banks in Germany, namely, the Deutsche, the Dresdner, and the Commerz Banks. These played ball with and helped the cartels and monopolies. As all students of nazism know, it was the cartels and the big banks which financed Hitler's final drive to power. Thus, concentration of financial power helped on the concentration of economic power, and then the two forces joined hands to aid in creating a dictatorship of political power with all of the terrible consequences which ensued.

CONCENTRATIONS IN BANKING AND CREDIT ARE ALSO SERIOUS DANGERS IN THIS COUNTRY

All these examples paint an image of what is likely to happen in this country if we permit the concentration of banking and credit, which has already gone far, to go farther. For here, as elsewhere, the control over credit is moving into fewer and fewer hands.

At the same time industry has been moving out of competition into closer and closer concentration—monopoly and quasi-monopoly. This has been helped by the big banks. If we do not wish to travel the path of Canada, Great Britain, and Germany, we should do something effective to check and, if possible, to roll back the concentration of banking and credit. For he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well.

Unfortunately, we have already traveled very far down the way of the concentration of credit and banking. This has been done by the growth of the original home offices of the big banks, such as the Continental and First

National Banks of Chicago and the Chase and National City Banks of New York, but also by three other forms of accretion, namely, mergers, branch banking, and bank holding companies.

BANK MERGERS HAVE INCREASED RAPIDLY

During the past 9 years, bank mergers have been growing apace. The following number of banks have been merged since 1947:

Year:	*Number of mergers*
1947	82
1948	77
1949	76
1950	89
1951	79
1952	99
1953	115
1954	207
1955	231
Total	1,076

Source: Federal Deposit Insurance Corporation.

Thus, nearly 1,100 banks merged during these 9 years, with the numbers greatly increasing during the last 3 years. This, moreover, was during a period when the total number of banks in the country was decreasing by 475, from 14,759 to 14,284. This was a decrease of 3.2 percent.

Among the big mergers were those in New York City of the Chase National Bank and the Bank of Manhattan, of the National City and the First National, the Chemical Bank & Trust and the Corn Exchange, and the Bankers

Trust and Public National. These mergers alone involved $19½ billion of assets and over 57 percent of the banking facilities of New York City. There have been a great many other mergers in other portions of the country.

BANK BRANCHES HAVE ALSO MULTIPLIED

The second way control over credit becomes concentrated is through the opening of branches. The organization of branch banks proceeded very rapidly in the 1920's, and to check their growth various States passed laws limiting, and in some cases preventing it, as in the case of Illinois. National banks had previously been implicitly prohibited from opening branches, and there was a strong movement to remove this prohibition and completely open up the field for the national banks. This, however, was not done. Instead, by the McFadden Act and other measures, national banks have been permitted to open branches only to the degree permitted by State laws and State authorities.

I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act.

Despite these restrictions on branch banking there has been a great expansion of branches during the last 9 years. At the end of 1946 there were 4,220 branches. This number had increased by the end of last year to 7,391. This was a growth of 3,171 branches, or 75 percent. Among the banks with many branches is the Bank of America,

which is now the largest bank in the world, and which dominates banking in California.

HOLDING COMPANIES HAVE ALSO EXPANDED RAPIDLY

The third way in which credit is becoming concentrated is through the device of holding companies. Holding companies have been developed in part—I would say largely—in order to get around restrictions on branch banking. A State will prohibit branch banking, and so a holding company will be organized, which will buy up individual banks and operate them, in effect, within the State, and which sometimes buy up banks in other States and also operate them, in effect, as branches. Even though local officers and directors are used, the direction rests in the holding company. Two out-of-State holding companies have invaded Illinois in just this way, and each company controls three banks in Illinois, despite our Illinois laws prohibiting branch banking.

Now, the two holding companies which operate out of Minneapolis—namely, the First Bank Stock Corporation of Minneapolis, which had 75 banks and 6 branches, and which operated in 4 States, with total deposits of $1,352,000,000 as of the end of 1954, and the Northwest Bancorporation of Minneapolis, which had 72 banks and 22 branches in 7 States with deposits of $1,583,000,000—have been developed and formed largely because of restrictions on branch banking in Minnesota, Nebraska, North Dakota, South Dakota, and Montana. Since branch banking was prohibited or restricted, at least originally, these holding companies buy up the controlling interests in the banks and operate them as branches.

I see the eminent senior Senator from North Dakota present, and if he wishes, he may make whatever comment he wishes to make.

Mr. LANGER. I have no comment except to say that what the distinguished Senator has said is absolutely true.

Mr. DOUGLAS. I thank the Senator.

In New York the State is divided into 10 zones. Branch banking is permitted within each of the zones, but a bank cannot have branches in another zone. What happened there? The Marine Midland Co., of Jersey City, was organized, and it bought banks in each of the 10 zones and established 125 branches. As of the end of 1954, it had total deposits of $1,635,000,000. Now, the letter of the law is complied with, but, in effect, each of those 10 banks—each one within a given zone—is operated as a unit of a centralized banking system.

TRANSAMERICA CORP. IS LARGEST HOLDING COMPANY AND GROWING RAPIDLY

The biggest holding company is, of course, Transamerica, which was originally closely affiliated with the Giannini banking interests and the Bank of America but which has attained greater independence in recent years.

As the eminent junior Senator from Virginia stated yesterday, that holding company not only had banks in 5 States, with 167 branches, and banking deposits of $2,021,000,000 as of the end of 1954, but it is somewhat unique in that it has a large number of nonbanking corporations which it controls and directs.

I wish to make a correction for the RECORD. I said that at the end of 1954 Transamerica had banks in five States. As I shall show in a few minutes, it now has banks in 10 States, because it has been expanding, in recent months and weeks, at a very rapid rate.

I yield to the Senator from Virginia, who seems to want to make a statement.

Mr. ROBERTSON. I was going to suggest what the Senator has just stated, that Transamerica now has banks in 10 States.

Mr. DOUGLAS. That is correct. Perhaps we should say that "Eastward the course of banking empire takes its way."

In addition, Transamerica owns one of the largest insurance companies in the United States—the Occidental Life Insurance Co.—and other insurance companies and a variety of other industrial enterprises, including a salmon packing company which packs some of the good Columbia River salmon, which I am sorry to say have displaced Maine salmon from the table, and so forth. As everyone should know, the present bill requires the divestiture of those nonbanking assets.

Mr. MORSE. Mr. President, will the Senator from Illinois yield?

The PRESIDING OFFICER (Mr. NEUBERGER in the chair). Does the Senator from Illinois yield to the Senator from Oregon?

Mr. DOUGLAS. I am glad to yield.

Mr. MORSE. I regret that the Senator from Illinois has said he is sorry that Columbia salmon have displaced Maine salmon. I will see that he gets a Columbia salmon again, to refresh his taste and enable him better to understand why Columbia salmon have replaced Maine salmon.

Mr. DOUGLAS. The Senator from Illinois was permitting his boyhood fondness for landlocked Maine sal-

mon to express itself, in contrast with the sockeye salmon which goes through such an amazing odyssey from the inland lakes to the sea, and back again.

Mr. President, not only does Transamerica have branches in California, but it also has greatly expanded its operations elsewhere. It has purchased a bank in Oregon—the First National Bank, I believe—and has expanded its holdings there until they totaled 68 branches and had 45 percent of the bank deposits in that State at the end of 1954. It controls most of the banking resources in Nevada. The two banks it controls in Nevada had 77 percent of the bank deposits in that State at the end of 1954. At the end of 1954, the 1 bank it owned in Arizona had 17 branches and 21 percent of the bank deposits in that State; and since that time there has been further expansion. So, Mr. President, the Transamerica Corporation is a most powerful group.

OTHER HOLDING COMPANIES CONTROL LARGE PERCENTAGE OF TOTAL DEPOSITS IN VARIOUS STATES

Now let us consider the two holding companies which operate out of Minneapolis: The First Bank Stock Corp., with deposits at the end of 1954 of $1,352,000,000; and the Northwest Bancorporation, with deposits of $1,502,000,000. If we add them together, we find that those 2 holding companies then controlled 55 percent of the bank deposits in Minnesota, 44 percent of the bank deposits in Montana, 29 percent of the bank deposits in North Dakota, and 32½ percent of the bank deposits in South Dakota; and these figures are correct only as of the end of 1954.

In a minute I shall speak of the extraordinary expansion which has occurred in more recent years. The figures I have given are taken from pages 51 and 52 of the

printed hearings of the Banking and Currency Committee which are on the desks of all Senators. In addition, there are minor holdings of the Northwest Bancorporation in Iowa, Nebraska, and Wisconsin.

Then there is the First Security Corp., which is based primarily upon Utah, where in 1954 it controlled almost 24.6 percent of the bank deposits in that state; and 32.5 percent of the bank deposits in Idaho. In recent years this corporation has also been expanded.

As is well known, the corporation is controlled by the Eccles family. Mr. Eccles was for many years a member of the board of governors of the Federal Reserve System, and for many years was chairman of the board. In my opinion he was one of the most distinguished public servants we have had in the United States for many years. Mr. Eccles made war on holding companies when he was a public servant, and I know he was absolutely sincere in doing so, because he thought they were against the public interest. Then he resigned from the Federal Reserve Board, and went into private banking; and now as a private banker he is naturally seeking to expand his banking interests to the fullest degree possible. There is nothing in the slightest degree unethical in what Mr. Eccles is doing. He happens to be a close personal friend of mine. But since I believe that the expansion of bank holding companies is not in the public interest, I shall oppose the future expansion of the First Security Corp., across State lines, just as I am opposing expansion of other bank holding corporations.

Mr. President, in addition to those instances, there are also a considerable number of bank holding companies which at present operate only within State lines, whereas the ones to which I have previously referred

operate across State lines. However, there are some which operate only within a single State. As I have previously mentioned, one of them is the Marine Midland Corp., operating in New York, with deposits at the end of 1954 of $1,636,000,000. Another is the Wisconsin Bankshares Corp., which had 6 banks and 14 branches, and at the end of 1954 had deposits of $780,000,000.

Still another is the BancOhio Corp., with 21 banks and 17 branches, and deposits of $556,000,000 at the end of 1954. In Massachusetts there are 2, namely, the Baystate Corp., with 9 banks and 66 branches and with deposits of $399,000,000; and the Shawmut group, with 14 banks, 37 branches, and deposits of $523,000,000.

Then there are two, which have just been given special exemption, namely, the Trust Company of Georgia Associates and the Trustees of the First National Bank of Louisville, of Louisville, Ky.

Then there are minor holding companies as well.

Mr. KUCHEL. Mr. President, will the Senator from Illinois yield to me?

Mr. DOUGLAS. I am glad to yield for a question.

Mr. KUCHEL. First of all, let me ask the Senator from Illinois whether he is now arguing, or laying a foundation, for the amendment he has proposed.

Mr. DOUGLAS. That is correct.

Mr. KUCHEL. I wish to say to the Senator from Illinois that my inclination is to support his amendment. But I wish to ask a question. I think the Senator from Illinois said a few moments ago that in his judgment the theory of holding companies was contrary to the public interest.

Mr. DOUGLAS. No; I said that further expansion of holding companies in the field of banking would be contrary to the public interest.

Mr. KUCHEL. Then do I correctly understand that it is the position of the Senator from Illinois that the situation existing today with respect to bank holding companies in his judgment is not against the public interest?

Mr. DOUGLAS. If any other Senator wishes to make a motion to require bank holding companies to divest themselves of their bank stock as well as of their nonbanking assets the Senator from Illinois will support such a motion.

But all that the Senator from Illinois is at present trying to do is to prevent bank holding companies from expanding across State lines, unless the States give them explicit permission to do so.

Mr. KUCHEL. As I say, my inclination is to support my friend from Illinois in that venture.

Mr. DOUGLAS. The inclinations of the Senator from California are always very helpful and generous.

Mr. KUCHEL. I appreciate that statement.

If the pending bill is designed to prohibit holding companies in the public interest, my question of the Senator is this—and I asked the same question earlier of the Senator from Indiana [Mr. CAPEHART]—Why does the bill make certain specific exemptions, on the basis of policy?

Mr. DOUGLAS. The Senator from Illinois is not too happy about the exemptions which we have granted.

Mr. KUCHEL. Is his unhappiness of sufficient strength to cause him to oppose the bill on that basis?

Mr. DOUGLAS. No; it is not, because I think, on the whole, the bill is a step forward. I am not too happy about these exemptions. They came about in the play of stresses and strains of banking and political life. I think I voted against most of them in committee. But if my amendment is approved, I think, on the whole, the bill will be a big step forward. If it is not approved, it will be a little step forward.

Mr. KUCHEL. As I understand, the Senator cannot find justification for eliminating some holding companies, while at the same time permitting and protecting others.

Mr. DOUGLAS. The Senator from Illinois has been very unhappy about that situation.

HOLDING COMPANIES HAVE EXPANDED MORE RAPIDLY IN RECENT MONTHS

Mr. President, the figures which I have been giving apply as of the end of 1954. Since then the process of acquisition of banks by holding companies has proceeded apace.

The First Security Corporation has been "getting into the act." It bought up the Commercial Bank of Utah, with $18 million in deposits, and 8 banking offices, in January of this year, and the Uinta State Bank, of Vernal, Utah, according to a report in the American Banker for March 12, 1956.

Transamerica has been extending its empire. It acquired the Southern Arizona Bank & Trust Co., with 7 banking offices and $77 million in deposits, in November of 1955. I believe that is the old group of banks formerly headed by Lewis W. Douglas.

It acquired the Bank of New Mexico, with $23 million in deposits and 4 banking offices in January 1956.

It took over the First National Bank of Caldwell, Idaho, the Continental State Bank at Boise, Idaho, and the Bank of Eastern Idaho, at Idaho Falls, with $41 million in total deposits and 7 banking offices, in January 1956. It took over the Walker Bank & Trust Co. of Salt Lake City, with $117 million in deposits and 5 banking offices, in February 1956.

It took over the Sandy City Bank of Sandy, Utah, with $7 million deposits and 2 banking offices, in March 1956.

I hold in my hand an article from the Salt Lake Tribune of April 13, 1956, which describes the purchase by Transamerica of the Casper, Wyo., First National Bank and the Riverton National Bank, which were old-time Wyoming financial institutions. The Waddell family of Casper were the principal shareholders in those institutions.

According to my information, Transamerica has also purchased in March 1956 the Cache Valley Banking Co., of Logan, Utah, with $9 million in deposits. These three Utah acquisitions by Transamerica give it and the First Security Corp. together 49½ percent of the bank deposits in that State, according to data furnished to me today by the Federal Reserve Board.

If my information is correct, Transamerica also purchased the Montana Bank, of Great Falls, Mont. Since we held the hearings last year, it has gone into New Mexico, Idaho, Utah, Montana, and Wyoming for the first time. The financial information which I am able to obtain is that in the case of many of these banks Transamerica has paid far more than the book value of the stock.

As Transamerica has been expanding, the Minneapolis bank holding companies have been expanding as well. The First Bank Stock Corp. of Minneapolis, Minn., has purchased the Worthington National Bank of that town in Minnesota, with $7 million in deposits; the Northern Minnesota National Bank, of Duluth, with $57 million in deposits; the Duluth National Bank, of that city, with $9 million in deposits; the First National Bank of Hibbing, Minn., with $13 million in deposits; the First National Bank of Virginia, Minn., with $12 million in deposits; and the Batavia National Bank, of LaCrosse, Wis., with $12 million in deposits. This LaCrosse acquisition moves their Minneapolis holding company into Wisconsin for the first time.

Marine Midland of New York has also purchased two banks, namely, the First National Bank of Herkimer, with $9 million in deposits, and the Bank of Towanda, also with $9 million in deposits.

So the bank holding companies have been expanding very rapidly in recent months, possibly because of a desire to "beat the gun" so that they would have a foothold in new States and not be required to divest themselves of these banks when the new law went into effect—and possibly in fear that if my amendment were approved they would be shut off from future expansion across State lines.

Mr. President, I have said all this to lay the background for our amendment. It is not merely my amendment. It is also sponsored by a very eminent group of Senators. It has been advocated, as we all know, by the Independent Bankers Association of America. It has been endorsed by the American Bankers Association, although I suspect that some of the big banks are not too happy with it. Nevertheless, the official action of the American Bankers Association is in its favor.

COMMITTEE BILL MAKES NEEDED IMPROVEMENTS

I wish to speak very briefly about the changes which our amendment would make in the bill as it has been reported. I think the Senator from Virginia [Mr. ROBERTSON] deserves to be congratulated for the work he has done in getting this bank holding bill out on the floor of the Senate. It makes two fundamental changes. In the first place, it requires the divestment by bank holding companies of nonbanking assets, and hence removes the possibility of future abuse.

The second feature is that any future expansion of bank holding companies, including the purchase of additional banks, will be permitted only if the Federal Reserve Board gives its permission.

The bill lays down a number of standards to be followed by the Board, including standards relating to financial history, condition of the company, prospects of the company, character of management, needs of the community, whether the acquisition would expand the size of the bank holding company beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking, and so forth.

PENDING AMENDMENT PREVENTS BANK ACQUISITION BY OUT-OF-STATE HOLDING COMPANY UNLESS STATE LAW EXPRESSLY PERMITS

Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States. At present no State specifically grants such permission. Therefore the immediate practical effect would be to bar the expansion

of bank holding companies across State lines. But the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided. If they were to do so, then such expansion would be subject to the rules and judgment of the Federal Reserve Board.

Even with my amendment, the Federal Reserve Board would still have final jurisdiction over the acquisition of banks or bank holding companies within a given State, that is, intrastate acquisitions. If and when individual States permitted a bank holding company from another State to acquire assets across State lines, then the Federal Reserve Board would have final jurisdiction in those cases as well.

I wish to repeat that, so far as interstate acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost identical with the present provision which governs branch banking.

Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

Anyone who favors States rights, it seems to me should support my amendment. I am not urging it on that ground, however. I believe in a somewhat unified banking system. However, so far as the bank holding companies are concerned, I want to check their expansion. This seems to me to be about the best way of doing so.

AMENDMENT DOES NOT AID BUT RATHER IMPEDES FURTHLP MONOPOLISTIC EXPANSION ACROSS STATE LINES

My good friend the Senator from Virginia [Mr. ROBERTSON] yesterday, in his speech presenting the bill, criticized my amendment on the ground that, by making further interstate expansion more difficult, it would freeze the present situation and would aid monopoly.

In the first place, it does not freeze the situation as the analysis of the powers left to the Board makes clear. It is still possible to have an expansion of a bank-holding company within its home State, if it musters the approval of the Federal Reserve Board. Moreover, if State law permits, and if approved by the Board, interstate acquisitions are possible. Therefore the amendment does not freeze the situation.

If the amendment aided the existing holding companies, as the Senator's argument implies, they would favor it. They do not favor it. They are a very able group of men. I am informed that Transamerica and the two Minneapolis holding companies, and the First Security Corporation of Utah, are very much opposed to my amendment. I believe they know their own self-interest, and pursue it, as is quite proper. I am not blaming them for that. Therefore it must be news to them that the amendment would aid and protect them in their existing position.

Basically, the argument of the Senator from Virginia seems to be that the way to check monopoly is not to check it, and that by permitting other competing banking concentrations the same right to expand and take over independent banks, which is enjoyed by present holding companies, we would bring about a more competitive situation.

Surely the existence of monopolistic conditions in some areas is no justification for true opponents of monopoly to urge that their growth be permitted in all areas on the principle of "justice among monopolies." The present degree of concentration of control does not give everyone else a vested right to equivalent expansion. Furthermore, the big holding companies, freed from the restraint of my amendment, would undoubtedly keep far ahead of the rest of the pack. These are unequal races, in which the strong usually outdistance the weak.

I am not interested in having a bank situation in which there are only two banks in a State competing with each other. I am interested in a bank situation in which there are a large number of banks with no monopoly and with a dispersion of power.

If the Senate really desires to reverse the trend toward the concentration of banking, it could write legislation requiring the divestiture not merely of nonbanking assets, but of banking properties themselves, beyond certain limits. If anyone proposes an amendment such as that, I again wish to assure him in advance that I shall support it. However, no one suggests such a proposal in the bill, and it should not be argued against my amendment that it does not require it.

What the bill with my amendment does is to check a rising trend to monopoly without undoing it completely.

I yield the floor.

Mr. ROBERTSON. Mr. President, I suggest the absence of a quorum.

Mr. BENNETT. Mr. President, will the Senator withhold the suggestion for the present?

Mr. ROBERTSON: I will withhold it for the moment.

Mr. BENNETT. Mr. President, I have grave doubt about the wisdom of the amendment of the Senator from Illinois [Mr. DOUGLAS] in the form in which it is presented. I recognize that it is less severe than the House language which contains a flat, unequivocal prohibition against bank holding companies crossing State lines. But it is only slightly less severe in that it makes a blanket prohibition which can only be lifted by specific affirmative action by the States and in its present form creates an evil which I must oppose.

The net effect of the amendment is to require every State that does not now have legislation prohibiting bank holding companies to discriminate in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the discrimination.

So far as I can learn, no State has of its own volition, and by action of its own legislature, set up such a discrimination. There are some States, including the State of Illinois, which prohibit all bank holding companies, domestic as well as foreign. This is not discriminatory. But I know of no State that permits domestic bank holding companies to operate within its borders and shuts out their counterparts residents in other States. That would be the effect of this amendment.

For Congress to require discrimination in interstate commerce, and then leave it to the several States to correct it, is a strange approach, out of harmony with the basic American concept of fairness and fair play. It smacks a little of the concept that a man is guilty until proved innocent.

It will have two other interesting consequences. It will preserve and protect the status quo in those States in which foreign or domestic bank holding companies are now operating, and will serve to intensify their expansion within these narrowed ranges. This would tend to set up some areas of bank holding company concentration and others that will be free.

I think I can look at this problem objectively. In my State we have two big bank holding companies represented, one foreign and one domestic, and a number of smaller local banking groups. At last count we had 97 banks in the State, 58 in holding companies and 46 operating as independents. So I am in the middle, and can afford to look at the principles involved. Since I want to eliminate rather than create discrimination, and since I want the States left free to act on this subject affirmatively for themselves, and not first be burdened with discrimination by our action, I am forced to vote against the amendment.

Mr. BRICKER. Mr. President, I wish briefly to discuss the amendment offered by the Senator from Illinois [Mr. DOUGLAS], not particularly as it affects the rights of the States, although I did serve for many years in my State in a capacity which afforded me opportunity to consider attempts to prevent discrimination by one State against another, the tendency, manifested again 2 years ago, to Balkanize State jurisdictions, and matters related to constitutionality, and so forth, and I believe constructive service was rendered in that field. However, I consider a constitutional question to be involved in the amendment submitted by the Senator from Illinois.

Mr. President, the amendment proposed by the Senator from Illinois was considered by the Banking and Currency Committee and was rejected by the committee In fact.

only four votes were recorded in favor of the proposal. The Federal Reserve Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation are all opposed to this amendment, because, in effect, it constitutes an absolute prohibition against future expansion by bank holding companies. I am sure it is obvious that every bank holding company in the country is opposed to this punitive proposal.

I stated earlier the procedure under S. 2577 for the Federal Reserve to consider every proposed acquisition of additional banks whether within the State or across State lines. Both types of acquisitions are treated the same. Under the bill, a bank holding company must obtain prior approval from the Federal Reserve Board before it can acquire a bank. The Federal Reserve Board in considering an application for an acquisition must take into consideration five factors. These factors are, first, the financial history and condition of the company or companies in the banks concerned; second, their prospects; third, character of their management; fourth, convenience, needs, and welfare of the communities in the area concerned; and, fifth, whether or not the effect of such acquisition would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

The last factor I named is the most important and requires the Federal Reserve Board to consider the question of the public interest and the preservation of competition in the field of banking. This provision gives the Federal Reserve Board power to prevent undue concentrations of banking activities and at the same time permits the strengthening and expansion of banking facilities when needed.

The Douglas amendment prohibits the acquisition of a bank outside the home State of a bank holding company unless the laws of the State to be entered specifically authorize such acquisition. I submit, Mr. President, that no State in this country has enacted laws along this line. So the effect of the Douglas amendment is to absolutely prohibit a bank from crossing State lines. This proposal suggests that bank holding companies are evil per se and that any further growth should be prohibited. The amendment is another attempt to force bank holding companies out of business. This is contrary to the theory of the Senate bill which seeks to regulate bank holding companies and not to punish them.

Some statements have been made to the effect that this amendment protects States' rights. I believe that I am as strong a States rights advocate as any Member of this body. However, this amendment forces States to take legislative action to protect themselves and thus is clearly a derogation of States' rights.

Section 7 of S. 2577 preserves the true States' rights in regard to this question. The bill reserves to the States their present authority to regulate bank holding company operations within their borders and does not force the States to take any action. The committee believes that this provision is an adequate preservation of the rights of our States.

I should also like to point out that the Douglas amendments runs counter to the policy of the National Bank Act and our dual system of National and State banks. The National Bank Act recognizes the exclusive jurisdiction of the Federal Government over national banks just as the States have exclusive jurisdiction over State banks. The branch banking law is cited as a precedent for giving powers to States over national banks. The branch-banking law is the

only major exception to the general rule that the Federal Government has exclusive jurisdiction over national banks.

However, it must be remembered that prior to the McFadden Act of 1927, national banks did not have statutory authority to establish branches. The purpose of the McFadden Act and the Banking Act of 1933 was to permit national banks to compete with State banks in States which authorized State banks to have branches. Congress merely gave national banks equal powers with State banks in respect to branch offices. These acts enlarged the powers of national banks rather than restricted them. Certainly it cannot be argued successfully that the branch-banking law is a precedent for permiting States to place restrictions on national banks and take away privileges they now enjoy.

In conclusion, Mr. President, I wish to reiterate that the committee rejected this amendment. The Federal Reserve Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and all the bank holding companies are absolutely opposed to it, and I hope the Senate will reject the amendment in the interest of sound banking and the preservation of the competitive system of banking in our country as between the various States and as between the Federal Government and the States.

Mr. PAYNE. Mr. President, I ask unanimous consent to have printed in the RECORD, a statement concerning the amendment offered by the Senator from Illinois, for himself and other Senators, and concerning the bill itself.

The PRESIDING OFFICER. Is there objection?

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

STATEMENT BY SENATOR PAYNE

The junior Senator from Maine would like to speak briefly today in support of bank holding company bill S.

2577, now under debate by the Senate. At the very outset, I would like to emphasize my firm faith in the independent banking system which has been the foundation of economic growth in the United States, the traditional source of capital investment, and the holder of the savings of millions of individual Americans. It is my firm belief that S. 2577 with the amendments approved by the Senate Committee on Banking and Currency and with the additional amendment proposed by the senior Senator from Illinois [Mr. DOUGLAS] will halt the trend toward the destruction of the independent banking system and will preserve independent banking as the financial base of the United States economy.

During the hearings held last summer on various bank holding bills before the Senate Committee on Banking and Currency, of which I am a member, witnesses representing bank holding companies repeatedly questioned the need for regulation or limitation of their operations. These witnesses stated that there had been no abuse of either the letter or the spirit of the law in their operations. And they were right, because there is now no law that effectively regulates the conduct of the bank holding company. The bank holding company is structurally beyond the reach of present statutory laws. Separate segments of its operations are subject to careful regulation, such as its subsidiary banks which are subject to the national banking laws and to the banking laws of the States in which they operate. The nonbanking subsidiaries of bank holding companies are regulated in the same way as other completely independent corporations. However, the totality of the bank holding company operation is in many respects, because of its unique structure, beyond the law. Through its ability to cross State lines, the bank holding company can operate in a way closed to the independent bank. The

competition presented by a single bank which is a subsidiary of a bank holding company may not in any legal sense be unfair competition, but the fact that it is backed by the powerful assets of a vast bank holding company gives it a competitive advantage that is undeniable. And this competitive advantage springs from the fact that the bank holding company can operate in a manner closed to the independent bank.

I have heard it said that the independent banker is afraid of competition. I do not believe that it is necessary to give any extended argument to disprove this assertion. The independent banker is naturally afraid of competition which is going to put him out of business. And he has every right to resent the competition of the bank holding company subsidiary which has capital resources behind it of a vastness not available to the independent banker by the very nature of his operation as an independent bank. Some would say that this kind of competition is good for the independent banks. It is not good for them if it is going to eliminate them as independent banking units. And it is not good for the economic stability of the country if independent banks are no longer able to compete successfully.

It is important to establish in any discussion of bank holding company legislation the value of the independent banking system. The independent banking system has been the traditional banking system in the United States. The independent banks financed the economic growth of this country through some of its most expansive periods. Methods and regulations governing the methods of independent banking have evolved with the development of our economy. Mistakes which were made have been corrected so that we now have a carefully regulated and safe independent banking system, privately owned and

operated, working for the benefit of the communities the independent banks serve.

The independent bank is a local operation, owned and managed by citizens of the community in which it operates. The particular financial needs and problems of the community are well-known and thoroughly understood by the directors and officers of the local independent bank who in no small measure contributes to the economic growth and financial well-being of that community. What is important to the community is important to the financial leaders of that community. And in the independent bank those financial leaders are in a position to act in the interests of the community.

In the bank whose control is in the hands of the bank holding company's shareholders, the policy of the bank must necessarily be concerned with insuring a profit to the controlling shareholders who are not in all likelihood, local people. What is most profitable for the shareholders may also be in the interest of the community in which the bank is operating, but this does not necessarily follow. Where there is a conflict between community interest and the profit interest of the shareholders who are not members of that community, it would seem likely that the policy of the bank might well be directed toward serving its shareholders. In the independent bank serving a community this situation will not arise in the same way. True the directors and officers of the independent bank must also serve their shareholders. But in most cases those shareholders are also local people, residents of the community. No one would pretend that every action taken by every board of directors of every independent bank is inevitably in the interests of the community which these banks are serving. But the incidence rate of a correlation between the interest of local shareholders and the com-

munity itself could naturally be expected to be higher in the case of the independent bank than in the case of a bank which is owned by a bank holding company whose shareholders are spread throughout a far wider area than the town or city.

The bank is a semipublic institution. The bank may be privately owned, but in serving its owners, its activities must be in accord with the public interest, both to justify its existence and to comply with the laws which regulate banking. By insuring the preservation of the independent banking system through the passage of S. 2577, we can insure the preservation of the public character of banking.

The divestment provisions of S. 2577 have been described by some as unduly harsh, unnecessary, and unjust. If we accept the fundamental argument, and I think we must accept it, that it is neither wise nor safe nor in the public interest to combine banking assets with nonbanking assets in the same financial structure, then the divestment provisions of S. 2577 are neither unduly harsh, unnecessary, nor unjust. Special tax exemptions in the act will enable bank holding companies to preserve their nonbanking assets after divestment in the form of banking assets, or the bank holding company may distribute them to the holding company shareholders as the directors see fit.

Although I approve of S. 2577 as a definite step in the right direction, it is my feeling that more can be done to insure the preservation of the independent banking system at this time. My distinguished colleague, the senior Senator from Illinois [Mr. DOUGLAS] has introduced an amendment to S. 2577 which I have cosponsored. This amendment would require that State legislatures pass specific legislation authorizing bank holding companies from another State to acquire interests in State banks

located within its borders. The purpose of this amendment is to return to the States their traditional control over the activities of the State banks now nominally under the State's authority.

S. 2577 leaves the control of the future expansion of bank holding companies to the discretion of the Federal Reserve Board. It is not my intention to question the capacity of the Federal Reserve Board to carry out the will of the Congress, but it seems to me that the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State governments and is an area best left to their discretion rather than to have it solely under the jurisdiction of the Federal Reserve Board.

Mr. President, in this brief statement, I have not attempted to go into the complexities of S. 2577. I have spoken in very broad terms, and have tried only to outline some of the reasons why I am in favor of S. 2577 with the amendment proposed by Senator DOUGLAS. We now have before us a bill which is just and reasonable. It does not pretend to rectify all the problems involved in bank holding companies. But it will, if enacted, go a long way toward halting the trend toward overconcentration of financial interests in the United States. The Douglas amendment would reestablish State authority over State banks. I am convinced that it will be in the interests of our banking system and in the interests of all the people of this Nation to enact S. 2577 with the Douglas amendment.

Mr. ROBERTSON. Mr. President, I suggest the absence of a quorum.

Mr. MORSE. Mr. President, will the Senator from Virginia withhold his suggestion?

Mr. ROBERTSON. I shall be glad to do so.

Mr. MORSE. Mr. President, I wish to associate myself with the remarks of the Senator from Illinois [Mr. DOUGLAS]. I have been advised that his amendment is favored by independent bankers across the country. I know of no group which is more identified with free enterprise than are the independent bankers; and I know of no group more in favor of States rights, so far as concerns protecting the economic interests at the lower level of private business institutions. What they have in effect pointed out is that the breadth of the extension of great banking empires across State lines as having a very detrimental effect upon the continuation of the American competitive system in the banking industry. It seems to me that if we are in favor of the competitive enterprise system we will support the Douglas amendment.

Mr. ROBERTSON. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

Aiken	Green	McNamara
Anderson	Hayden	Millikin
Barkley	Hennings	Morse
Beall	Hill	Mundt
Bennett	Holland	Murray
Bible	Hruska	Neely
Bricker	Humphrey	Neuberger
Bridges	Jackson	Pastore
Butler	Jenner	Payne
Byrd	Johnson, Tex.	Potter

Capehart	Johnston, S. C.	Purtell
Carlson	Kefauver	Robertson
Case, N. J.	Kerr	Russell
Case, S. Dak.	Knowland	Schoeppel
Cotton	Kuchel	Scott
Curtis	Laird	Smathers
Daniel	Langer	Smith, Maine
Dirksen	Lehman	Smith, N. J.
Douglas	Long	Symington
Duff	Magnuson	Thye
Eastland	Malone	Welker
Ellender	Mansfield	Williams
Ervin	Martin, Iowa	Wofford
Frear	Martin, Pa.	Young
Fulbright	McCarthy	
George	McClellan	

The PRESIDING OFFICER. A quorum is present.

The question is on agreeing to the amendment offered by the Senator from Illinois [Mr. DOUGLAS] on behalf of himself and other Senators.

Mr. ROBERTSON. Mr. President, I ask for the yeas and nays on the Douglas amendment.

The yeas and nays were ordered.

Mr. KNOWLAND. Mr. President, for the information of the Senate will the distinguished Senator from Virginia, who is handling the bill on the floor, indicate what position the Federal Reserve Board and the FDIC took, if they took any position on the matter, when the amendment was presented in committee?

Mr. ROBERTSON. Mr. President, the amendment was first considered last summer, before the bill was reported. At that time there were no votes for the amend-

ment. It was considered again in February. At that time there were four votes for the amendment. The testimony before the committee was that the President was in favor of the proposed legislation without the amendment. The amendment was opposed by the Federal Reserve Board, the Comptroller of the Currency, and the FDIC.

Mr. DOUGLAS. Mr. President, will the Senator yield for a supplementary question?

Mr. ROBERTSON. I yield.

Mr. DOUGLAS. Is it not true that while there were only 4 votes for the amendment, there were only 6 votes against it?

Mr. ROBERTSON. That is correct. The others were not recorded.

The PRESIDING OFFICER. The question is on the amendment offered by the Senator from Illinois [Mr. DOUGLAS] for himself and other Senators. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. JOHNSON of Texas. I announce that the Senator from New Mexico [Mr. CHAVEZ], the Senator from Kentucky [Mr. CLEMENTS], the Senator from Tennessee [Mr. GORE], the Senator from Massachustts [Mr. KENNEDY], the Senator from Oklahoma [Mr. MONRONEY], the Senator from Wyoming [Mr. O'MAHONEY], and the Senator from Alabama [Mr. SPARKMAN] are absent on official business.

The Senator from Mississippi [Mr. STENNIS] is absent because of a death in his family.

I further announce, if present and voting, the Senator from Tennessee [Mr. GORE], the Senator from Oklahoma [Mr. MONRONEY], the Senator from Wyoming [Mr. O'MAHONEY], the Senator from Alabama [Mr. SPARKMAN], and the Senator from Mississippi [Mr. STENNIS] would each vote "yea."

Mr. KNOWLAND. I announce that the Senator from Colorado [Mr. ALLOTT] and the Senator from New York [Mr. IVES] are absent because of illness.

The Senator from Ohio [Mr. BENDER], the Senator from Connecticut [Mr. BUSH], the Senator from Idaho [Mr. DWORSHAK], the Senator from Arizona [Mr. GOLDWATER], and the Senator from Iowa [Mr. HICKENLOOPER] are necessarily absent.

The Senator from Vermont [Mr. FLANDERS], the Senator from Massachusetts [Mr. SALTONSTALL], the Senator from Utah [Mr. WATKINS], and the Senator from Wisconsin [Mr. WILEY] are absent on official business.

The Senator from Wyoming [Mr. BARRETT] is detained on official business.

On this vote, the Senator from Colorado [Mr. ALLOTT] is paired with the Senator from Vermont [Mr. FLANDERS]. If present and voting, the Senator from Colorado [Mr. ALLOTT] would vote "yea" and the Senator from Vermont [Mr. FLANDERS] would vote "nay".

Also on this vote, the Senator from Wyoming [Mr. BARRETT] is paired with the Senator from Utah [Mr. WATKINS]. If present and voting, the Senator from Wyoming would vote "yea" and the Senator from Utah would vote "nay."

The result was announced—yeas 58, nays 18, as follows:

YEAS—53

Aiken	Holland	McNamara
Anderson	Hruska	Millikin
Barkley	Humphrey	Morse
Bridges	Jackson	Murray
Byrd	Jenner	Neely
Capehart	Johnson, Tex.	Neuberger
Case, N. J.	Johnston, S. C.	Pastore
Cotton	Kefauver	Payne
Curtis	Kerr	Potter
Daniel	Kuchel	Purtell
Dirksen	Laird	Russell
Douglas	Langer	Scott
Duff	Lehman	Smathers
Eastland	Long	Smith, Maine
Ellender	Magnuson	Smith, N. J.
Ervin	Mansfield	Symington
Fulbright	Martin, Iowa	Welker
George	Martin, Pa.	Wofford
Hennings	McCarthy	
Hill	McClellan	

NAYS—18

Beall	Case, S. Dak.	Mundt
Bennett	Frear	Robertson
Bible	Green	Schoeppel
Bricker	Hayden	Thye
Butler	Knowland	Williams
Carlson	Malone	Young

NOT VOTING—20

Allott	Flanders	O'Mahoney
Barrett	Goldwater	Saltonstall
Bender	Gore	Sparkman
Bush	Hickenlooper	Stennis
Chavez	Ives	Watkins
Clements	Kennedy	Wiley
Dworshak	Monroney	

So the amendment offered by Mr. DOUGLAS, for himself and other Senators, was agreed to.

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FILED
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JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 658

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

THE NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, and FIRST BANK STOCK CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court is reported at 219 F. Supp. 842. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 335 F.2d 444, and is reprinted as Appendix A of the Petition.

JURISDICTION

Respondents agree with the statement in the Petition that the jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1). Respondents do not agree that this case warrants review by this Court under Rule 19 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Does a transaction in which one bank acquired the assets of other banks violate the Bank Holding Company Act of 1956 in view of the well-defined exception created by the words "other than a bank" in 12 *U.S.C.* §1842(a)(3)?

2. Does the "Douglas Amendment," 12 *U.S.C.* §1842(d), apply to transactions for which the prior approval of the Board of Governors of the Federal Reserve System is not required under 12 *U.S.C.* §1842(a)?

3. Does a State which has suffered no injury or damage, and is not aggrieved, have standing to maintain a civil action to enforce a Federal statute which does not provide for civil enforcement?

STATUTES INVOLVED

The statutes involved are 12 *U.S.C.* §1842(a), 12 *U.S.C.* §1842(d), and 12 *U.S.C.* §1847.

STATEMENT OF THE CASE

This is an action brought by the State of South Dakota against The National Bank of South Dakota, Sioux Falls, and First Bank Stock Corporation. Declaratory and injunctive relief, including divestiture, are sought (R. 7-8). United States District Court for the District of South Dakota entered judgment in favor of defendants (R. 133). The United States Court of Appeals for the Eighth Circuit affirmed. 335 F.2d 444.

The National Bank of South Dakota, Sioux Falls, is a national bank association organized under the laws of the United States (R. 1). First Bank Stock Corporation is a Delaware corporation with its principal place of business at Minneapolis, Minnesota (R. 1-2). First Bank Stock Corporation is a bank holding company registered as such under the

Bank Holding Company Act of 1956, 12 *U.S.C.* §§1841-1848 (R. 2). At all times material, First Bank Stock Corporation has owned not less than ninety percent of the voting shares of stock of The National Bank of South Dakota, Sioux Falls (R. 42-43).

This litigation arises out of a transaction which took effect on December 6, 1962. Involved in that transaction were three state banks:

> Farmers and Merchants Bank, Platte, South Dakota;
> Farmers and Merchants Bank, Presho, South Dakota;
> Farmers and Merchants Bank, Wessington Springs, South Dakota.

Prior to December 6, 1962, Mr. N. J. Thomson and members of his family held controlling stock interests in each of these banks. For convenience these banks will be referred to as the "Thomson Banks" (R. 112-113).

The transaction took place pursuant to an "Agreement of Merger and Plan of Reorganization" which was entered into under date of October 9, 1962, by the three Thomson Banks, The National Bank of South Dakota, Sioux Falls, and First Bank Stock Corporation (R. 8-41). Pursuant to the Agreement, and effective on December 6, 1962, the Thomson Banks merged with The National Bank of South Dakota, Sioux Falls, under the charter of the latter bank, and the resulting bank acquired all of the assets and liabilities of the Thomson Banks. Effective on the same date, The National Bank of South Dakota, Sioux Falls, established branches at Platte, Corsica, Presho and Wessington Springs, South Dakota, the municipalities in which the Thomson Banks had maintained banking offices (R. 3, 113).

The merger transaction was consummated with the prior written consent of the Comptroller of the Currency as required by the Bank Merger Act of 1960, 12 *U.S.C.* §1828(c)

(R. 44, 56). The branches of The National Bank of South Dakota, Sioux Falls, at Platte, Corsica, Presho and Wessington Springs, South Dakota, were established with the approval of the Comptroller of the Currency under 12 *U.S.C.* §36(c) (R. 44, 56-59).

The merger transaction was one in which The National Bank of South Dakota, Sioux Falls, acquired the *assets* of the Thomson Banks. Plaintiff admitted that this was an acquisition of assets in its complaint.[1] In reliance upon the allegations of the complaint,[2] the District Court held that this transaction was an acquisition of assets (R. 112).

Plaintiff sought to change its position before the Court of Appeals and contends that the transaction was an acquisition of stock rather than an acquisition of assets. In response to this contention, the Court of Appeals stated:

> "Plaintiff cannot thus shift its position upon appeal and assert an issue not raised in the trial court. In any event the record clearly shows that National Bank acquired the assets of the Thomson Banks, not their stock." 335 F.2d at 449; Petitioner's Appendix, page A 11.

This merger has not been attacked under the anti-trust laws. It had no adverse affect upon competition. The National Bank of South Dakota, Sioux Falls, ranks third among the six banks in Sioux Falls (R. 45-55). The three Thomson Banks serve entirely separate agricultural trade areas in

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[1]See paragraphs *Fourth*, *Fifth*, *Sixth*, *Seventh* and *Ninth* of Count II of the complaint (R. 6-7).

[2]Plaintiff and defendants moved for summary judgment (R. 68-69, 41-42). Under Rule 56(c) of the Federal Rules of Civil Procedure, the District Court is directed to consider "the *pleadings*, depositions and admissions on file together with the affidavits, if any, * * *" in deciding a motion for summary judgment.

central South Dakota,[3] ranging in population from 479 persons to 1,488 persons (R. 43). The factors which warranted review by this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and *United States v. First National Bank & Trust Company of Lexington*, 376 U.S. 665 (1964), are not present in this case.

SUMMARY OF ARGUMENT

This case does not warrant review by this Court.

The substantive law issue involves a clearly defined exception in the Bank Holding Company Act of 1956 which permits a subsidiary bank to acquire the assets of another bank without prior approval of the Board of Governors of the Federal Reserve System. This exception was deliberately created as part of the evident Congressional plan.

The so-called "Douglas Amendment" to the Bank Holding Company Act does not apply to this type of transaction. The Douglas Amendment applies only to those transactions requiring approval of the Board of Governors. Since this transaction did not require Board approval, the Douglas Amendment does not apply.

The four courts which have considered the effect of the Douglas Amendment have reached the same result. There is no conflict of judicial authority which needs resolution by this Court. The Board of Governors of the Federal Reserve System, the agency charged with administration of the Bank

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[3]Platte, South Dakota, is approximately 120 miles west of Sioux Falls, 100 miles southwest of Huron (the location of the nearest pre-existing branch of the Sioux Falls Bank), approximately 75 miles south of Wessington Springs, and approximately 90 miles east of Presho.

Presho is approximately 200 miles west of Sioux Falls, approximately 150 miles southwest of Huron, and approximately 100 miles west of Wessington Springs.

Wessington Springs is approximately 120 miles northwest of Sioux Falls and approximately 41 miles southwest of Huron.

Holding Company Act, has consistently interpreted that statute as not restricting bank mergers of the type under consideration here.

The decisions of the lower courts to the effect that Petitioner lacks standing to sue are clearly correct. Petitioner is not an aggrieved party; it has not suffered any injury or damage. The Bank Holding Company Act contains no provision for civil enforcement.

The lower courts decided the instant case on its merits adversely to Petitioner. The holding that Petitioner lacks standing to sue is purely an alternative basis for decision. The lower court holding on the standing issue is not in conflict with the decision of any other court or federal agency.

ARGUMENT

I.

THE BANK HOLDING COMPANY ACT ISSUE

The substantive law issue in the instant case is extremely narrow, involving clear and unambiguous provisions of the Bank Holding Company Act of 1956. 12 *U.S.C.* §§1841-1848. No amount of strained argument can convert the issue into one warranting review by this Court of certiorari.

On December 6, 1962, The National Bank of South Dakota, Sioux Falls, acquired all of the assets of the three Thomson Banks. This transaction—far from being illegal as Petitioner contends—falls within a well-recognized exception in the Bank Holding Company Act of 1956.

The relevant prohibitory provisions of the statute are found in §1842(a)(3), which read as follows:

> "It shall be unlawful except with the prior approval of the Board
>
> (3) for any bank holding company or subsidiary thereof, *other than a bank*, to acquire all or substantially all of the assets of a bank;" (Italics supplied.)

The statute prohibits acquisitions of assets by a bank holding company and by *non-bank* subsidiaries. However, the statute permits the acquisition of assets by a subsidiary of a bank holding company if that subsidiary is a bank.

As noted, the assets of the Thomson Banks were acquired by The National Bank of South Dakota, Sioux Falls. The National Bank of South Dakota, Sioux Falls, is a subsidiary of a bank holding company. It is, however, a *bank subsidiary.* Therefore, when that bank acquired the assets of the Thomson Banks there was no violation of the Bank Holding Company Act of 1956.

A. The Phrase "Other Than a Bank" Is a Deliberately Created Exception.

The phrase "other than a bank" in §1842(a)(3) constitutes a deliberate, and carefully created, exception in the Bank Holding Company Act of 1956. The statute prohibits a bank holding company, or a non-banking subsidiary thereof, from acquiring the assets of a bank. However, the phrase "other than a bank" limits the prohibitory language, so that it does not extend to instances in which a *bank* acquires the assets of another bank, even though the acquiring bank is a subsidiary of a bank holding company. It is clear from the legislative history of the statute that this exception was deliberately created. Five major bills considered in Congress between 1952 and 1956 used the phrase "other than a bank" to limit the prohibition against the acquisition of assets.[4] The limiting phrase "other than a bank" was no legislative oversight.

Congress had good reason for not legislating against transactions in which a bank, which is a subsidiary of a bank

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[4]The relevant portions of these bills are set forth in Appendix A attached to this brief.

holding company, acquires the assets of another bank. In 1952, Governor J. L. Robertson appeared for the Board of Governors of the Federal Reserve System before the House Committee on Banking and Currency. In his testimony, Governor Robertson stated the views of the Board of Governors on asset acquisitions by banks as follows:

> "It will be observed that we do not propose that the legislation cover acquisitions of bank assets, as distinguished from bank stocks. Our reasons for this should be explained. If a bank acquires the assets of another bank, ordinarily it is for the purpose of converting such other bank into a branch of the acquiring bank. In such cases, of course, the consent of one of the bank supervisory agencies generally would be required under existing law. In those few cases in which the acquisition of assets would not result in the establishment of a branch but would have the effect of eliminating the bank whose assets are acquired, the matter should be covered, not by bank holding company legislation, but by provisions of Federal law already on the books which make acquisitions of bank assets by banks subject to approval by the appropriate supervisory agency, that is, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Board of Governors. Those provisions are contained in the Federal Deposit Insurance Act which was enacted in 1950.
>
> "We would suggest, therefore, that any further restrictions on the acquisition of bank assets, as distinguished from bank stocks, should be made in the form of amendments to section 18(c) of the Federal Deposit Insurance Act rather than in legislation directed at the expansion of bank holding companies."

Hearings before the House Committee on Banking and Currency on H.R. 6504, 82d Cong., 2d Sess. (June 24, 1952), p. 24.

The Board of Governors opposed duplication in regulation. For this reason, the Board of Governors favored provisions which would exempt asset acquisitions by banks from regula-

tion under the Bank Holding Company Act. These views prevailed. Beyond question, by deliberate legislative design, the Bank Holding Company Act does not prohibit transactions in which one bank acquires the assets of another, even where the acquiring bank is a subsidiary of a bank holding company.

B. The "Douglas Amendment" Does Not Apply.

Petitioner attempts to invoke the so-called "Douglas Amendment" to the Bank Holding Company Act, 12 *U.S.C.* §1842(d). Section 1842(d) provides in part as follows:

> "Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State Bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (Italics supplied.)

The key words in §1842(d) are "no application shall be approved under this section." In the statutory scheme, the transactions requiring applications for prior approval of the Board of Governors of the Federal Reserve System are enumerated in §1842(a). Section 1842(d) is a limitation on the power of the Board of Governors to approve an out-of-state acquisition, but only if the Board's approval is required under §1842(a) in the first place. Section 1842(d) applies only to those transactions needing prior approval of the Board under §1842(a).

By virtue of the "other than a bank" exception in §1842(a), no application to the Board of Governors was required in the

instant case. Clearly, therefore, §1842(d) — the so-called "Douglas Amendment"—has no application to the instant case.

C. The Key Phrase in the "Douglas Amendment" Was Carefully Drafted.

The legislative history of the Bank Holding Company Act of 1956 shows that the "Douglas Amendment" had many antecedents. At least five major bills considered by Congress contained provisions to restrict out-of-state expansion by bank holding companies. The text of these provisions is set forth in Appendix B.

Upon analysis of these provisions, the statutory scheme becomes apparent. In each provision, the key phrase "no application shall be approved under this section" stands out.

Neither the Douglas Amendment, nor any of its legislative antecedents, was intended to possess any independent prohibitory power. The prohibitory power is lodged in other provisions requiring prior approval of the Board of Governors. The purposes of the Douglas Amendment, and its antecedents, were accomplished by restricting the power of the Board of Governors to approve out-of-state transactions.

The key phrase "no application shall be approved under this section" was inserted in the Douglas Amendment deliberately. The presence of the same key phrase in similar provisions of prior bills makes that plain. Full force and effect should be given to the evident statutory plan.

D. The "Douglas Amendment" Was Not Intended to Affect Exempt Transactions.

Petitioner seeks to convey the impression that the Douglas Amendment was intended to prohibit all out-of-state expansion by bank holding companies and their subsidiaries. Clearly, this is not true. Congress recognized that the Bank Holding Company Act of 1956 was limited legislation. This statute does not purport to be a complete system of regulation. *Senate Report 1095*, 84th Cong., 1st Sess., stated:

> "No pretense is made that this bill will regulate all forms of centralized control of financial institutions." 2 *U. S. Code Cong. & Admin. News* (1956), pp. 2482, 2493.

Even Senator Douglas, the sponsor of the Amendment, recognized that there were exemptions in the bill. On the floor of the Senate, Senator Douglas stated:[5]

> "Mr. Douglas: No; it is not, because I think, on the whole, the bill is a step forward. I am not too happy about these exemptions. They came about in the play of stresses and strains of banking and political life. I think I voted against most of them in committee. But if my amendment is approved, I think, on the whole, the bill will be a big step forward. If it is not approved, it will be a little step forward." 102 Cong. Rec. 6859 (1956).

The prohibitory portions of the statute were carefully drafted in committee following lengthy hearings. Through the use of precise language, Congress chose the transactions to be regulated under the statute.

The Douglas Amendment was superimposed on the statutory plan which emerged from committee. In adopting the Amendment, Congress did not intend to re-write the permissive and restrictive provisions of the statute, which had been

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[5]This statement by Senator Douglas was part of a colloquy with Senator Kuchel. That colloquy, in its entirety, is set forth in an Appendix to the Petition for Writ of Certiorari in this case, at pages A26 to A28.

carefully developed after lengthy hearings and years of study. All that was intended was to insert a special provision limiting the power of the Board of Governors to approve out-of-state acquisitions. It was never intended to apply to transactions which did not require Board approval.

E. There Is No Conflict of Decisions.

The meaning and effect of the Douglas Amendment has been considered by four courts. All four courts agree that the Douglas Amendment does not enlarge upon the restrictions of the statute, but merely establishes a special rule to be followed by the Board of Governors in considering applications for out-of-state acquisitions.

In *First National Bank in Billings, et al., v. First Bank Stock Corporation, et al.*, 197 F. Supp. 417, 422 (D. Mont. 1961), the Court said:

> "Counsel for plaintiffs have devoted considerable time and effort to an argument that plaintiffs are proceeding under §1842(d) rather than §1842(a). Defendants contend that subdivision (d) is nothing more than a legislative direction to the Board and does not in any way enlarge on the provisions of (a). I agree with this interpretation and hold that these subdivisions, being part of the one general statute, must be construed together. [Citations omitted.]
>
> "A thorough analysis of subdivision (d), §1842, reveals that its only purpose is to make a special rule with reference to out of state holding companies acquiring voting shares in, or assets of, an additional state bank. Before such shares or assets could be legally acquired, after the effective date of the Act, the statutes of the state in which such bank was located would have to authorize such acquisition by direct language and not by implication. This subdivision does not enlarge on the prohibitions of subdivision (a) other than mentioned. Before the Board would look to (d) it would first have to find that approval was necessary under the other provisions of the Act. * * *"

That decision was affirmed by the United States Court of Appeals for the Ninth Circuit. *First National Bank in Billings, et al., v. First Bank Stock Corporation, et al.*, 306 F.2d 937 (9th Cir. 1962).

In the instant case, the District Court held that the Douglas Amendment, §1842(d), applied only in those transactions for which approval of the Board of Governors is required under §1842(a). *State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al.*, 219 F. Supp. 842, 852-53 (D. So. Dak. 1963).

That decision was affirmed by the United States Court of Appeals for the Eighth Circuit. *State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al.*, 235 F.2d 444 (8th Cir. 1964). In that connection, the Court of Appeals stated:

> "The remaining subsections of §1842, including subsection (d) largely relied upon by the plaintiff, set forth the procedures to be followed where an application to the Board of Governors is required. The words of subsection (d) reading: 'no application shall be approved under this section' manifest a Congressional intention that the section only applies to instances where approval of the Board of Governors is required. As Judge Mickelson points out, such interpretation is substantiated by the legislative history and the administrative interpretation of such provisions by the Board of Governors." 335 F.2d at 449.

Thus, all four courts which have considered the effect of the Douglas Amendment have reached the same result. There is no conflict of judicial authority which needs resolution by this Court.

F. Uniform Administrative Construction of the Statute.

The primary responsibility for the administration of the Bank Holding Company Act of 1956 is vested in the Board of Governors of the Federal Reserve System. The Board of Governors has consistently interpreted the Bank Holding Company Act as not prohibiting bank mergers of the type under consideration here, even where a subsidiary bank of an out-of-state bank holding company is concerned.

A clear statement of the construction placed on the Bank Holding Company Act by the Board of Covernors is found in the Board's first annual report to Congress, filed May 7, 1958. *Federal Reserve Bulletin*, July, 1958, pp. 776-796. In that report, the Board recommended that a number of amendments be made in the Bank Holding Company Act. Number 15 of the amendments recommended by the Board discussed the significance of the phrase "other than a bank."[6] The Board of Governors recommended that the words "other than a bank" be deleted from §1842(a)(3).[7]

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[6]The full text of the Board's recommendation Number 15 is set forth in Appendix C.

[7]There is no inconsistency between this recommendation made in 1958 and the earlier position taken by the Board of Governors prior to the enactment of the Bank Holding Company Act of 1956. Prior to enactment of the Bank Holding Company Act, the Board of Governors suggested that the statute not regulate transactions in which a subsidiary bank acquired the assets of another bank. Such transactions normally involve the establishment of branches which require approval of regulatory agencies. The Board recommended that any further regulation of bank mergers be accomplished through an amendment to §18(c) of the Federal Deposit Insurance Act. See statement of Governor Robertson, *supra*, p. 8.

The Bank Merger Act of 1960 took the form of an amendment to §18(c) of the Federal Deposit Insurance Act. 12 *U.S.C.* §1828(c); 74 *Stat.* 129-130 (1960). During the interim between the enactment of the Bank Holding Company Act in 1956 and the enactment of the Bank Merger Act of 1960, the Board of Governors filed its first annual report in 1958. Inasmuch as no bank merger legislation had yet been enacted, the Board of Governors recommended that the words "other than a bank" be deleted from §1842(a)(3).

The Board of Governors set forth the reasons for its 1958 recommendation that this phrase be deleted. It pointed out that the statute prohibited expansion by a bank holding company through the acquisition of stock of an independent bank. It noted, however, that by virtue of the phrase "other than a bank," the statute did not apply to transactions in which a holding company subsidiary bank acquired the assets of an independent bank. The Board of Governors further noted that §1842(d) did not affect the latter type of transaction because Board approval was not required under §1842(a).

Notwithstanding this 1958 recommendation of the Board of Governors, Congress did not delete the phrase "other than a bank" in §1842(a)(3). Instead, Congress enacted the Bank Merger Act of 1960, 12 *U.S.C.* §1828(c).

The passage of the Bank Merger Act of 1960 caused the Board of Governors to withdraw its 1958 recommendation. In its 1960 annual report to Congress, the Board stated that the passage of the Bank Merger Act of 1960 made the amendment to the Bank Holding Company Act unnecessary. The Board stated that to regulate mergers under the Bank Holding Company Act, as well as under the Bank Merger Act, would produce an unjustified duplication of supervision.[8]

That the Board of Governors has adhered to these views is clear from the letter of Chairman Martin to Congressman Wright Patman dated April 17, 1962, which is set forth in Appendix E. The interpretation which the Board of Governors has placed on the statute also appears from the letter dated April 30, 1963, from Merritt Sherman, Secretary, to Mr. Joseph H. Colman, Chairman of the Board of First Bank Stock Corporation (R. 66-68).

The following is the most significant paragraph of that letter:

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[8]The statement of the Board of Governors in this respect is set forth in Appendix D.

> "Since shortly after passage of the Act in 1956 the Board has consistently construed section 3(d) [§1842 (d)] to apply only to cases in which Board approval is required under section 3(a) [§1842(a)]. The Board has also taken the position in various cases that section 3(a)(3) [§1842(a)(3)] does not necessitate Board approval of a holding company bank's acquisition of the assets of another bank, although Board consent would now be required in such a case under the Bank Merger Act of 1960 if the acquiring bank were a State member bank." (Underlining in original.) (R. 67.)

The Board of Governors has been consistent in its interpretation of the statute. The phrase "other than a bank" in §1842(a)(3) has been given full effect by the Board of Governors. Board approval is not required in those instances when one bank acquires the assets of other banks, even when the acquiring bank is a subsidiary of the bank holding company.

The Board of Governors has fully recognized the effect of the key phrase in the Douglas Amendment—"no application shall be approved under this section." The Douglas Amendment applies only to those transactions for which Board approval is required under §1842(a).

The Board of Governors of the Federal Reserve System has the primary responsibility for the administration of the Bank Holding Company Act of 1956. Under the decisions of this Court, the interpretation placed on the statute by the Board of Governors is entitled to substantial weight. *United States v. Jackson*, 280 U.S. 183, 193 (1930); *United States v. Citizens Loan Co.*, 316 U.S. 209, 214 (1942); *Billings v. Truesdell*, 321 U.S. 542, 552-553 (1944).

G. No Justification for "Piercing the Corporate Veil."

Petitioner asks this Court to "pierce the corporate veil" and hold that First Bank Stock Corporation, rather than its subsidiary bank, acquired the assets of the three Thomson Banks. Both the trial court, and the Court of Appeals, rejected these contentions. 219 F. Supp. 842, 853-854, 335 F.2d 444, 449.

In support of its claims, Petitioner cites the case of *Whitney National Bank v. Bank of New Orleans*, 323 F.2d 290 (D.C. Cir. 1963), *cert. granted* 32 U.S.L. Week 3325 (1964). That case is clearly distinguishable from the case at bar. In the *Whitney* case, a bank holding company arrangement was established for the sole and deliberate purpose of evading a prohibition against the establishment of branch banks. The Court of Appeals for the District of Columbia was prepared to "pierce the corporate veil" to find that what was ostensibly a bank holding company arrangement was actually branch banking.

The Court distinguished the situation in the *Whitney* case from that presented in *First National Bank in Billings v. First Bank Stock Corporation*, 306 F.2d 937 (9th Cir. 1962). The Court of Appeals for the District of Columbia recognized that First Bank Stock Corporation is very different from the holding company involved in the *Whitney* case, stating:

> "The Billings case is far from being factually 'on all fours' with the present case. There the bank holding company [i.e., First Bank Stock Corporation] was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only

capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location." 323 F.2d at 303.

The *Whitney* case is *not* authority for piercing the corporate veil in the instant case. There is no resemblance between First Bank Stock Corporation and the holding company arrangement in which the "corporate veil" should be pierced.

II.

THE STANDING ISSUE

A. The Lower Court Decisions That Petitioner Lacked Standing Are Clearly Correct.

1. The Petitioner Is Not an Aggrieved Party.

In its Petition, Petitioner complains, in rather colorful language, that it has been the victim of an "invasion" by a "foreign Bank Holding Company." But certiorari is not granted on colorful language alone; and an examination of the facts shows that although Petitioner may be unhappy, it has not suffered any injury or damage.

It is true that three banks chartered by Petitioner—the three Thomson banks—have become branches of a national bank. But it is clear that Petitioner has not been wronged by this action and cannot complain of it. This Court held long ago that the consent of a State is not prerequisite to the conversion of a state bank into a national bank. *Casey v. Galli*, 94 U.S. (IV Otto) 673 (1876).

Petitioner has furnished no proof of injury. While the complaint contains naked and conclusionary allegations of "irreparable injury," no proof was submitted in support of such claims. The State Superintendent of Banks, in his affidavit in support of Petitioner's motion for summary judg-

ment, presents no facts to substantiate any claim of damage or injury (R. 69-71).

The trial court found that Petitioner has not been wronged by the actions of the respondents.

> "The operation of the Thomson banks as branches by the National Bank does not appear to invade any established property rights of the State or of any state bank. The State has not demonstrated that any individual is being adversely affected by the operation of the branch banks." 219 F. Supp. 842, 847.

This finding was confirmed and quoted by the Court of Appeals. We submit that it is determinative of the question of Petitioner's standing.

It is basic to our system of law that in order to have standing to maintain an action, one must have suffered some injury or damage recognized by the law. Petitioner has failed utterly to show that either it or any of its citizens, corporate or natural, have suffered any legal wrong at the hands of the Respondents.

The Petition also recites that the State is threatened with damage; that its entire banking system is in danger of being "engulfed." We submit that this suggestion is rather fanciful. Petitioner has offered no evidence to support its claim, and, we submit, it cannot. Once again Petitioner attempts to build an issue on provocative words; but, as we have noted, certiorari is not granted on colorful language alone. No amount of argument can convert a bare and unsubstantiated allegation into an issue warranting certiorari.

2. The Bank Holding Company Act May Not Be Enforced in Civil Litigation.

The Bank Holding Company Act contains no provision for civil enforcement. Congress provided for criminal enforcement alone, 12 *U.S.C.* §1847, and an examination of the legislative history of the Act reveals clearly that Congress intended the provisions for criminal enforcement to be exclusive.

Petitioner asked the trial court and the Court of Appeals to grant a new remedy, to permit civil enforcement, and each court properly refused, stating:

> " 'Where Congress has not provided for civil suits to enforce federal legislation, it is not for the courts to do so. See *Riss & Company v. Association of American Railroads*, D.C., 178 F. Supp. 438 (1959)." 219 F. Supp. 842, 848." 335 F.2d 444, 447 (8th Cir. 1964).

The Petitioner's insistence that someone other than the Federal Government should have the right to enforce the Bank Holding Company Act is irrelevant. The issue is not whether Congress should have authorized civil enforcement, but whether it did. And, as both courts below held, Congress clearly intended that the provisions for criminal enforcement be exclusive. Courts may agree or disagree with the wisdom of Congressional intent; but they cannot rewrite the statute.

Moreover, the Petitioner's urgent claim that it is without remedy is unfounded. It is true that Congress has chosen not to give Petitioner a *judicial* remedy; but Petitioner has a *legislative* remedy. Petitioner, if it truly believes that its banking system is in danger of being "engulfed," may seek the assistance of Congress; and if the Petitioner's fears have substance, Congress may provide the remedy.

The Bank Holding Company Act is clear and unambiguous in its provision for enforcement by criminal procedures only. It is obvious that Petitioner wishes to change the Act; but amendments are made by Congress, not by the courts. Of

course, even if civil enforcement were permitted, Petitioner would not be a proper plaintiff since Petitioner is not aggrieved.

B. The Decision Below Is an Alternative Decision.

Both the trial court and the Court of Appeals decided that the State lacked standing (a) because the Bank Holding Company Act cannot be enforced in civil litigation, and (b) because the State had not been aggrieved. Moreover, each court also decided the case on its merits. We submit that a case coming to the Supreme Court in this posture, with these many alternative grounds for decision, is not a proper case for granting certiorari.

C. The Decision Below Is Not in Conflict with the Decision of Any Other Court or Federal Agency.

No other Federal Courts have decided the question of civil enforcement of the Bank Holding Company Act. The Board of Governors of the Federal Reserve System, charged with the responsibility for administering the Act, has repeatedly expressed the view that the Act may be enforced by criminal prosecution alone. There is no sound basis for overturning this long standing administrative interpretation.

CONCLUSION

The issues presented in this case are extremely narrow. The exception in the Bank Holding Company Act into which this transaction falls is well-recognized, clear and unambiguous. The courts which have considered the effect of the Douglas Amendment are in agreement. The lower court decisions in this case are in complete agreement with the interpretation which the Board of Governors of the Federal Reserve System has consistently placed on that statute since its enactment.

The decision of the Court of Appeals on the standing issue is purely an alternative basis for decision. As such, it does not warrant review by this Court. Furthermore, Petitioner has suffered no injury or wrong, is not an aggrieved party, and lacks standing to sue. In any event, Congress did not intend that the Bank Holding Company Act be enforced by civil litigation.

The decision of the Court of Appeals is clearly correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Extracts from Bills Dealing with Bank Holding Companies —Sections Containing the Phrase, "other than a bank".

H.R. 6504, 82d Cong., 2d Sess. (introduced in 1952):

> "Sec. 5. (a) It shall be unlawful except with the prior approval of the Board
>
> (3) for any bank holding company or subsidiary thereof *other than a bank* to acquire all or substantially all of the assets of a bank." (Italics supplied.)

Hearing before the House Committee on Banking and Currency on H.R. 6504, 82d Cong., 2d Sess. (June 24, 1952), p. 2.

S. 1118, 83d Cong., 1st Sess. (introduced in 1953):

> "Sec. 5. (a) It shall be unlawful except with the prior approval of the Board
>
> (3) for any bank holding company or subsidiary thereof *other than a bank* to acquire all or substantially all of the assets of a bank." (Italics supplied.)

Hearings before the Senate Committee on Banking and Currency, 83d Cong., 1st Sess. on S. 76 and S. 1118, part 1 (June 10, 11 and 12, 1953), p. 5.

H.R. 2674, 84th Cong., 1st Sess. (introduced in 1955):

> "Sec. 5. (a) It shall be unlawful except with the prior approval of the Board
>
> (3) for any bank holding company or subsidiary thereof, *other than a bank* to acquire all or substantially all of the assets of a bank." (Italics supplied.)

Hearings before the House Committee on Banking and Currency, 84th Cong., 1st Sess. on H.R. 2674 (February 28, March 1, 2, 3, 4, 7, 8 and 9, 1955), p. 2.

S. 880, 84th Cong., 1st Sess. (introduced in 1955):

> "Sec. 5. (a) It shall be unlawful except with the prior approval of the Board

(3) for any bank holding company or subsidiary thereof, *other than a bank,* to acquire all or substantially all of the assets of a bank." (Italics supplied.)

Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12 and 14, 1955), pp. 2-3.

H.R. 6227, 84th Cong., 1st Sess. (introduced in 1955):

"Sec. 5. (a) It shall be unlawful except with the prior approval of the Board

(3) for any bank holding company or subsidiary thereof, *other than a bank,* to acquire all or substantially all of the assets of a bank." (Italics supplied.)

Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12 and 14, 1955), p. 25.

APPENDIX B

Extracts from Bills Dealing with Bank Holding Companies —Sections Containing the Phrase, "no application shall be approved under this section".

H.R. 6594, 82d Cong., 2d Sess. (introduced in 1952):

"Sec. 5. (d) Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit (1) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any bank located outside of the State in which such bank holding company or subsidiary thereof maintains its principal office and place of business or in which it conducts its principal operations; (2) any bank holding company or subsidiary thereof which owns or controls in any manner a bank located in a State, the laws of which do not authorize

the operation of branches by banks, to acquire, directly or indirectly, any voting shares of or interest in or all or substantially all of the assets of any additional bank located in any such State." (Italics supplied.)

Hearing before the House Committee on Banking and Currency on H.R. 6504, 82d Cong., 2d Sess. (June 24, 1952), p. 3.

S. 1118, 83d Cong., 1st Sess. (introduced in 1953):

"Sec. 5. (d) Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit (1) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any bank located outside of the State in which such bank holding company or subsidiary thereof maintains its principal office and place of business or in which it conducts its principal operations; (2) any bank holding company or subsidiary thereof to acquire, directly or indirectly, any voting shares of or interest in or all or substantially all of the assets of any additional bank except in conformity with the laws governing branches of banks in such State." (Italics supplied.)

Hearings before the Senate Committee on Banking and Currency, 83d Cong., 1st Sess. on S. 76 and S. 1118, part 1 (June 10, 11 and 12, 1953) p. 6.

H.R. 2674, 84th Cong., 1st Sess. (introduced in 1955):

"Section 5. (c) Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit (1) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company or subsidiary thereof maintains its principal office and place of business or in which it conducts its principal operations; (2) any bank holding company

or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication." (Italics supplied.)

Hearings before the House Committee on Banking and Currency, 84th Cong., 1st Sess. on H.R. 2674 (February 28, March 1, 2, 3, 4, 7, 8 and 9, 1955), p. 3.

S. 880, 84th Cong., 1st Sess. (introduced in 1955):

"Sec. 5. (c) Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit (1) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company or subsidiary thereof maintains its principal office and place of business or in which it conducts its principal operations; (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication." (Italics supplied.)

Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12 and 14, 1955), p. 3.

H.R. 6227, 84th Cong., 1st Sess. (introduced in 1955):

"Sec. 5. (c) Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit (1) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company or subsidiary thereof maintains its principal office and place of business or in which it conducts its principal operations; (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such State, or (ii) unless such acquisition is at the time authorized by the statute law of such State by language specifically granting such authority affirmatively, and not merely by implication." (Italics supplied.)

Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess. on S. 880, S. 2350 and H.R. 6227 (July 5, 6, 7, 11, 12 and 14, 1955), p. 25.

APPENDIX C

Extract from First Annual Report of the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956, May 7, 1958 (printed in Federal Reserve Bulletin, July, 1958, pp. 776, 787-789):

"15. *Board approval for holding company banks' absorption of other banks* [*sec. 3(a)(3)*].—Section 3(a) now requires Board approval before a holding company may acquire bank stock either directly or indirectly, and also before a holding company or any of its subsidiaries, 'other than a bank,' may acquire directly or indirectly 'all or substantially all of the assets of a bank'. This al-

lows a bank in a holding company system to absorb another bank without the prior approval of the Board. It can be argued that this provision seriously weakens the act with respect to one of its major purposes—namely, to control the expansion of bank holding companies.

"It seems clear that Congress did not intend to control, through the Holding Company Act, what may be called the 'internal' expansion of the banking activities of holding company systems. A holding company bank may expand its deposits, loans, and other phases of its business, and may establish additional offices (where permitted by applicable laws) without regard to the Holding Company Act. However, the legislative history of the act reveals a general intent that a holding company system should not be permitted to absorb existing banking institutions except in accordance with its provisions.

"There are two methods by which a holding company system may absorb an existing independent bank: (1) it may acquire the controlling stock of the bank or (2) it may arrange to have the independent bank merge or consolidate with, or sell its business to, a holding company bank. The Holding Company Act applies to '(1)' but not to '(2)'; the question is whether this distinction is sound in principle.

"The argument has been advanced that the act should not apply to acquisitions via merger, consolidation, or purchase of assets, because such acquisitions are already subject to supervisory control—that is, either the merger or the usual consequent establishment of a branch, or both, must have the prior approval of a Federal or State bank supervisory authority or in some cases, both. It is true that this is usually the case and that the situation differs in that respect from a holding company's purchase of the stock of an existing bank, which ordinarily is subject to no governmental control other than that provided by the Holding Company Act.

"However, it does not appear that Congress intended to exclude additional-bank expansions of holding companies whenever they are subject to control by other governmental agencies in the banking field. A con-

spicuous example is the establishment of new banks by holding companies. No new national bank may be established without the prior approval of the Comptroller of the Currency, and no new State bank without the prior approval of the State bank chartering authority. Nevertheless, under section 3(a)(2) of the act a holding company may not establish any new bank 'except with the prior approval of the Board' in addition to that of the bank-chartering authority.

"It is to be noted also that the Senate Banking Committee, in commenting upon section 3(a)(3) stated:

> 'Acquisition of assets, as well as acquisition of stock, may be used to gain practical control of a bank's operations, especially at the existing site of operations. In order to encourage competitive banking and discourage monopoly of banking, this bill provides regulatory control over both types of acquisition (S. Rept. No. 1095 (84th Cong.), pt. 1, p. 8).'

This statement evidences the committee's concern with expansion via absorption of independent banks, but section 3(a)(3) does not effectively deal with this problem. That provision relates only to acquisition of the assets of an existing bank by a holding company or a nonbanking subsidiary. In actuality, however, such corporations rarely if ever acquire a bank's assets, and certainly their acquisition of a bank's assets could not 'be used to gain practical control of a bank's operations, especially at its existing site of operations,' which apparently was the committee's principal focus in this connection. Control of the kind described can be achieved only when a banking subsidiary of a holding company takes over an independent bank. Consequently, it appears that section 3(a)(3) in its present form is practically a nullity, and does not reach the problem referred to by the Senate Banking Committee.

"It is recognized that duplication of governmental regulation should be avoided wherever possible. But it is not clear that the objectives of the Holding Company Act will be carried out consistently by the various State and Federal supervisors in passing upon mergers (or

branch applications in connection therewith); in fact, there might be some question as to the authority of State bank supervisors to disapprove a proposed merger on the ground that it would be inconsistent with the purposes of the Federal Bank Holding Company Act. Consequently, on balance it is the conclusion of the Board that effectuation of the purposes of the act requires that holding-company banks' absorption of independent banks, by merger or otherwise, should be subject to the provisions of section 3 of the act.

"Mention should be made of the relationship of this recommendation to the prohibitions of section 3(d). Those prohibitions were intended, generally speaking, to prevent a holding company from expanding outside its 'home' State by purchase of bank stock or acquisition of the assets of additional banks. At the present time, however, by virtue of the exception in section 3(a)(3) with respect to banks absorptions of other banks, if a holding company owned one or more banks in a particular State on May 9, 1956, it may absorb additional banks in that State through merger or purchase of assets to the full extent permitted by State law or the National Bank Act, whichever is applicable.

"If the bank-merger exception in section 3(a)(3) is deleted as here suggested, and no other action were taken in this area, the result would be that, for practical purposes, section 3(d) would completely prevent any expansion of holding companies out-of-State subsidiary banks by absorption of other banks. However, the Board believes that such an absolute prohibition of absorptions, regardless of circumstances, would not be in the public interest, and consequently it recommends amendment of section 3(d) to permit such absorptions by out-of-State subsidiary banks when approved by the Board pursuant to section 3(a). This would not in any way cut down the present coverage of section 3(d) but would simply make that subsection inapplicable in the case of acquisitions of bank assets that would now be brought within the purview of section 3(a) for the first time.

"The question may be raised as to whether the general principle of section 3(d)—prevention of out-of-

State expansion by acquisition of additional banks—does not apply to acquisitions via mergers as well as to acquisitions via purchases of bank stock. The Board has never favored the absolute-prohibition approach of section 3(d), and therefore would not favor extension of that approach into a new area even if such extension were called for by strictly logical application of the principle.

"In addition, however, it is pointed out that an acquisition via merger (or similar absorption) almost invariably can be consummated only if approved by the appropriate State or Federal bank supervisory authority, whereas in many instances this is not necessary with respect to purchase of bank stock. Consequently, acquisitions through merger can occur only if the absorption is desirable (or at least acceptable) from the bank supervisory viewpoint, which provides some assurance that the absorption will be in the public interest as far as banking service is concerned. The Board considers this circumstance an additional reason for excluding such absorptions from the prohibitory provisions of section 3(d) and for permitting such out-of-State absorptions when approved by the Board on the basis of the factors enumerated in section 3(c).

"In this connection, it would seem that the general public policy regarding out-of-State expansion by bank holding companies, as embodied in section 3(d), would constitute a relevant element of the 'public interest' within the meaning of section 3(c), and that consequently the Board would be justified in applying more restrictive standards in passing upon proposed absorptions of banks located outside the 'home state' of the bank holding company.

"For the foregoing reasons, the Board recommends that the words 'other than a bank' in section 3(a)(3) be deleted, but that at the same time section 3(d) be amended so as not to preclude approval by the Board of the acquisition of bank assets by a holding company's subsidiary bank in another State."

APPENDIX D

Extract from the 1960 Annual Report to Congress of the Board of Governors of the Federal Reserve System:

"Under present law, a bank in a holding company system may expand by absorbing another bank without obtaining the prior approval of the Board of Governors under the Bank Holding Company Act. In its May 7, 1958 Report, the Board expressed the view that effectuation of the purposes of the Act required that a holding company bank's absorption of an independent bank, by merger or otherwise, should be subject to the provisions of the Act.

"On May 13, 1960, Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828) was amended to provide that, in practically all cases, bank mergers and absorptions must have the prior approval of one of the Federal bank supervisory agencies and that those agencies must take into consideration factors that are substantially similar to those enumerated in the Bank Holding Company Act. In view of the provisions of this so-called Bank Merger Act, the Board believes that extending the coverage of the Holding Company Act to comprise bank mergers involving holding company banks would produce an unjustified duplication of supervision. Accordingly, the Board withdraws its recommendation (Recommendation 15 of the May 7, 1958 Report) that the Holding Company Act be amended in this respect."

47th Annual Report of the Board of Governors of the Federal Reserve System, 1960, pp. 98-99.

APPENDIX E

Letter from Chairman Wm. McC. Martin, Jr. of the Board of Governors of the Federal Reserve System to Congressman Wright Patman:

"Board of Governors of the Federal Reserve System,
Office of the Chairman,
Washington, April 17, 1962.

Hon. Wright Patman,
Chairman, Select Committee on Small Business,
House of Representatives, Washington, D. C.

Dear Mr. Chairman:

This refers to your letter of April 7, 1962, regarding the recently approved merger of Bank of Idaho, Boise, Idaho, and The First National Bank of Bonners Ferry, Bonners Ferry, Idaho. Bank of Idaho is a subsidiary of Western Bancorporation, a bank holding company. You inquire as to the application of section 3(d) of the Bank Holding Company Act of 1956 to the merger, and also as to application of the section to a possible merger of Walker Bank & Trust Co., Salt Lake City, which also is a subsidiary of Western Bancorporation, with The First National Bank of Price, Price, Utah.

[Citation of Sec. 3(d) of the Bank Holding Company Act omitted.]

Section 3(a) of the Bank Holding Company Act requires the Board approval under that act before a bank holding company may acquire bank stock (with certain exceptions), and also before a holding company or any of its subsidiaries, other than a bank, may acquire all or substantially all of the assets of a bank. The underlined exception allows a bank in a holding company system to absorb another bank without prior approval under the Bank Holding Company Act, and no application would be made under that act with respect to such a transaction. Accordingly, section 3(d) of the Bank Holding Company Act does not apply to such a merger of banks, even though the continuing bank is to be a subsidiary of a bank holding company.

The general subject of the relationship of the Bank Holding Company Act to a merger involving a bank in a hold company system is discussed at pp. 98-99 of the Board's annual report for the year 1960, and an excerpt is attached for convenient reference.

Sincerely yours,

Wm. McC. Martin, Jr."

Bank Holding Companies—Scope of Operations and Stock Ownership, published by the House Committee on Banking and Currency, 88th Cong. (May 20, 1963), p. 27.